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VOLUME 4

FISHERIES POLLUTION REPORTS

PROSECUTIONS UNDER THE POLLUTION CONTROL AND HABITAT PROTECTION PROVISIONS OF THE FISHERIES ACT

July 1988

Canada

VOLUME 4

FISHERIES POLLUTION REPORTS

PROSECUTIONS UNDER THE POLLUTION CONTROL AND HABITAT PROTECTION PROVISIONS OF THE FISHERIES ACT

Prepared by

Environmental Protection
Conservation and Protection
Environment Canada

in co-operation with

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VOLUME 4

RAPPORTS SUR DES POURSUITES ANTI-POLLUTION

POURSUITES JUDICIAIRES ENGAGÉES EN VERTU DES DISPOSITIONS ANTI-POLLUTION ET DES DISPOSITIONS POUR LA PROTECTION DE L'HABITAT PRÉVUES DANS LA LOI SUR LES PÊCHES

Préparé par

La protection de l'environnement
Conservation et protection
Environnement Canada

en co-opération avec

Les Pêches dans le Pacifique et en eaux douces
Pêches et Océans Canada

Édité par

David O. Cox
John E. MacLatchy

Juillet, 1988

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I would particularly like to thank Mr. David Cox, who did the vast majority of all the work preparing Volume 4, for his diligent efforts. Mr. Cox worked part time with Environment Canada over the past year while he was completing his studies in law. He was admitted to the Ontario Bar this spring and recently started to work for Willms and Shier, a law firm in Toronto that specializes in land use environmental matters.

I would also like to thank Ms. Susan Gilbert and Ms. Marilyn Kansky of the West Coast Environmental Law Research Foundation for their efforts in preparing Volume 2 of the West Coast Environmental Law Reporter. Their work on contract with the Departments of the Environment and of Fisheries and Oceans in preparing the Reporter helped us in the preparation of Volume 4 of the Fisheries Pollution Reports.

Thanks also to Mr. John Cliffe, federal Department of Justice in Vancouver, Mr. Gordon Thompson, Environmental Protection, Pacific Region, and the many other people who have sent me copies of the various cases over the past few years.

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PREFACE

Volume 4 of Fisheries Pollution Reports (4 F.P.R.) primarily contains reasons for judgments for cases under the pollution control provisions (section 33) and the habitat protection provision (section 31) of the Fisheries Act. A few cases under other sections of the Fisheries Act are also reported where the issues are relevant to sections 33 and 31.

Judgements rendered under the Ocean Dumping Control Act and the Clean Air Act are included in this Volume. These two statutes are administered by Environment Canada. The first prosecution under the Arctic Water Pollution Prevention Act (Le Chene No. 1) is also reported in Volume 4. The prosecution was instituted by staff of Environment Canada.

Conventional law reports ordinarily contain only the court's reasons for judgement. Fisheries Pollution Reports also include remarks on sentencing and, in some cases, arguments by counsel before the courts. Since judgements and transcripts are available for a relatively small number of cases under sections 33 and 31 of the Fisheries Act, these additional materials on sentencing and arguments by counsel hopefully will be useful to some readers.

Volume 1 of the Fisheries Pollution Reports were prepared in 1976 by simply photocopying the judgements that were available. Volume 2 of the Fisheries Pollution Reports was published in 1980 in the conventional format of law reports. Volume 2 and reprinted Volume 1 are available as a single volume. Volume 3 contains cases that were before the courts in 1980 to 1983 with some appeal decisions that were rendered in early 1984.

Volume 4 contains cases that were before the courts in 1983 to 1987 plus the Supreme Court of Canada decision on the Ocean Dumping Control Act which was rendered in March 1988.

FISHERIES POLLUTION REPORTS

VOLUME 4

CASES REPORTED

---

1. Adams
   N.B. Provincial Court: February 6, 1986 1

2. Bell
   B.C. Provincial Court: June 21, 1984 4

3. Blue Lagoon Enterprises Ltd. et al.
   B.C. Provincial Court: October 3, 1984 7

4. British Columbia Railway Company
   B.C. Provincial Court: December 14, 1983 18

5. Burton
   Nfld. Court of Appeal: June 23, 1983 22

6. Canada Metal Company
   Manitoba Provincial Court: February 28, 1985 26
   * Clean Air Act (See 3 F.P.R. 447 for previous decisions)

7. Canadian Marine Drilling Ltd.
   NWT Territorial Court: October 14, 1983 35

8. Carolin Mines Ltd.
   (a) BC Provincial Court: March 30, 1984 41
   (b) BC County Court: October 10, 1985 46

9. Central Fraser Valley Regional District
   B.C. Provincial Court: June 26, 1987 57

10. Le Chene No. 1
    NWT Territorial Court: April 21, 1987 67
    * Arctic Waters Pollution Prevention Act

11. Chet Construction Ltd.
    B.C. Provincial Court: June 11, 1985 71

12. C.I.P. Inc.
    B.C. Provincial Court: December 16, 1986 75

13. C.I.P.A. Industries Ltd.
    B.C. Provincial Court: July 29, 1983 79

14. Cloverdale Paint and Chemicals Ltd.
    (a) B.C. Provincial Court: November 5, 1984 82
    (b) B.C. County Court: September 13, 1985 84
    (c) B.C. Court of Appeal: September 9, 1986 85
    (d) B.C. Provincial Court: May 12, 1987 88

FISHERIES POLLUTION REPORTS

VOLUME 4

CASES REPORTED

---

15. Compac Construction Ltd. et al.
    (a) B.C. Provincial Court: February 21, 1983 100
    (b) B.C. County Court: September 9, 1983 109

16. Crown Forest Industries Ltd.
    B.C. Provincial Court: April 28, 1987 113

17. Crown Zellerbach Properties Ltd.
    B.C. Provincial Court: February 27, 1984 117

18. Crown Zellerbach Canada Limited
    Supreme Court of Canada: March 24, 1988 128
    * Ocean Dumping Control Act
    Mr. Justice Le Dain (for majority) 132
    Mr. Justice La Forest (dissenting) 153

    Crown Zellerbach Canada Limited (en français)
    Cour Suprême du Canada: le 24 mars, 1988 165
    * La Loi sur l'immersion de déchêts en mer
    Le juge Le Dain (pour la majoritaire) 170
    Le juge La Forest (pour les dissidents) 192

19. Enheat Inc.
    N.S. Provincial Court: November 13, 1985 205

20. Enso Forest Products Ltd. & West Fraser Mills Ltd.
    B.C. Provincial Court: February 17, 1986 212

21. Epsilon Building Products Ltd.
    B.C. Provincial Court: June 4, 1986 213

22. FMC of Canada Ltd.
    B.C. County Court: February 19, 1875 216

23. Fraser River Harbour Commission & Richmond Landfill Ltd.
    B.C. Provincial Court: November 23, 1982 223
    (See 3 F.P.R. 390 for previous decision).

24. Goodlands Developments Ltd. et. al.
    B.C. Provincial Court: November 27, 1986, December 5, 1986 225

25. Gonder & Sons Ltd.
    Yukon Territorial Court: September 8, 1986 235

26. Gulf Canada Corporation
    NWT Territorial Court: August 13, 1987 237
    * Ocean Dumping Control Act

FISHERIES POLLUTION REPORTS

VOLUME 4

CASES REPORTED

---

27. Halls Refrigeration Ltd.
Nfld Provincial Court: October 15, 1987 247

28. Hodgson
N.S. Provincial Court: November 13, 1985 251

29. Hughes & Van Straten
B.C. Provincial Court: January 9, 1985 268

30. Jack Cewe Ltd.
B.C. Provincial Court: November 13, 1987 271

31. Kelsey
Nfld District Court: August 28, 1985 282

32. MacMillan Bloedel Ltd.
B.C. Provincial Court: September 25, 1985 294

33. McCain Foods Ltd.
N.B. Provincial Court: February 27, 1984 300

34. McKay and Brown
B.C. Provincial Court: March 10, 16, 1983 304

35. City of Merritt & B and E Refrigeration Co. Ltd.
B.C. Provincial Court: September 11, 1986 311

36. New Brunswick Coal Ltd.
N.B. Provincial Court: May 13, 1987 317

37. North Arm Transportation Ltd.
B.C. Provincial Court: March 17, 1983 328

38. Re Peralta et al. and The Queen in right of Ontario et al.
Peralta et al. v. Warner et al.
Ontario Court of Appeal: February 8, 1985 337

39. Petro Canada Inc.
B.C. Provincial Court: June 7, 1984 362
* Clean Air Act

40. Placer Development Ltd.
Yukon Territorial Court: December 12, 1983, January 2, 1985 366

41. City of Quesnel
B.C. County Court: January 5 & 6, 1987 393

FISHERIES POLLUTION REPORTS

VOLUME 4

CASES REPORTED

---

42. Robinson's Trucking Ltd.
NWT Territorial Court: June 21, 1984 399

43. Suncor Inc.
Alberta Provincial Court: May 25, 1985 409

44. Peters
B.C. Provincial Court: November 14, 1986 475

45. Tufcoat Sealcoating Ltd.
B.C. Provincial Court: October 28, 1986 477

46. Western Pulp Limited Partnership
B.C. Provincial Court: February 27, 1987 479

47. Western Stevedoring Company Ltd.
Supreme Court of Canada: May 7, 1984 486

48. Westmin Resources Ltd.
B.C. Provincial Court: August 1, 1985 487

49. Willis, Cunliffe, Tait & Co. and Spring Point Management Ltd.
B.C. Provincial Court: June 16, 1987 531

NEW BRUNSWICK PROVINCIAL COURT

R.v. ADAMS

LYNCH, Prov. Ct. J. Fredericton, February 6, 1986

***Fisheries Act*, R.S.C. 1970, c. F-14, as amended - Accused found guilty of charge under s. 31(1), unlawfully carrying on a work or undertaking resulting in the harmful alteration of a fish habitat - Time of year during which the excavation occurred, the removal of the vegetation and the permanance of the alteration of the habitat area were key factors.**

Sentencing - A token fine of $100 levied since cost of work done and the removal of the work done was so high - A section 33(7) order was made, requiring the Accused to stabilize the excavation area.

The accused ordered the excavation of a stream bank thereby causing the permanent alteration of trout habitat. The accused was charged under section 31(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14 as amended, with the harmful alteration, disruption or destruction of fish habitat.

Held, the Court found the accused guilty and a fine of $100.00 was levied.

The sentence involved a token fine since the cost to the accused of the work done, and removal of work done was so high. An order pursuant to section 33(7) was also made requiring the accused to stabilize the excavation site.

The Court was influenced by the following: The excavation had occurred in the spring, probably resulting in heavy siltation, thus greatly altering the natural cycle of the trout. It is probable that the removal of vegetation from the stream bank would cause a rise in temperature during the summer, and a migration of trout in the area until the vegetation had an opportunity to grow back. The Court also found the alteration of the habitat to have permanency.

David Clark, for the Crown.
David Kelly, R. Leslie Jackson, for the Accused.

LYNCH, Prov. Ct.J.

I want to thank both Counsel for the time spent on their briefs. I believe that the case as it boils down, because it was such a lengthy trial, this Court felt that it was necessary to receive briefs to attempt to review the expert evidence as given. This Court was involved in a previous case, *R. v. Barbour* case, which was reported (1983) 48 N.B.R., and I do find the issues that the Court must address itself to be somewhat similar. The facts of the case are not in dispute, that being to who ordered the bulldozing in actual fact. The bulldozing itself was a result of the orders of the defendant, Nelson Adams, and it is this Court's finding that all of the excavation done by the bulldozer was done through the direction of the defendant, Nelson Adams. The Court is influenced by the following factors in reaching its decision. It is influenced, first of all, by the time of year that the excavation took place. Bulldozing in the spring of the year is one of the most vulnerable times for the trout habitat. It is probable that the movement of the stream bed and the resulting heavy siltation altered greatly the natural cycle. Second of all, the removal of the vegetation on the stream bank would in all probability cause a rise in temperature during the summer, which again, would alter in this Court's finding, the temperature of the water, and cause in all probability a migration of trout in the area until the vegetation had an opportunity to grow back. It is true that the defendant's actions may greatly improve the trout habitat in the excavated area, and the work done there may greatly improve the numbers of fish, but the work was done arbitrarily and there was little, if any, regard given to the habitat downstream. In *R. v. Barbour*, (1983) 48 N.B.R., this Court found that the work must have some permanency in order to convict under the Section. I find that the excavation as shown by the evidence is such, that it is of a permanent alteration of the habitat and, in fact, changes that habitat in a very marked degree. It is trite that this Court not give the same protection to a small stream like the Noonan as it would give to a larger stream, say, such as the Nashwaak Stream, and had one conducted an alteration of a river, say, the size of the Nashwaak in a similar manner, the resulting disruption, while it would have been much greater, there would have been a permanent disruption. I'm satisfied by the evidence that the Crown has proved its case beyond a reasonable doubt, and I find the defendant, Nelson Adams guilty of the charge. Now with regards to sentencing?

SENTENCING

MR. CLARK

In this particular case, Your Honour, the Crown would not be looking for a large fine, but I would like the Court to consider an order under Section 33(7), which it's authorized to make under Section 31(4), for remedial action. The concern of the Crown here is that a large area has been left exposed and we're going to have a recurring problem out there each spring, and the damage that's already been done cannot be corrected, and therefore, the Crown would be asking for an order that Mr. Adams comply with Fisheries and Oceans biologist, in stabilizing the area and seeding it over. If it would please the Court, if it would like more detailed description of the work that Fisheries would like to have incorporated into the order, I could ask the Court for an adjournment and have Mr. Morantz here to outline just exactly --

(Editor: The Court adjourned briefly for counsel to discuss the wording of the order.)

MR. CLARK

Your Honour, we have reached an agreement, I believe, on the wording of an order, and we would ask an order that Mr. Adams cause stabilization of the excavation site be done as ordered, per the directions of Fisheries and Oceans.

. . .

LYNCH, PROV. Ct. J.

Any other penalty that you're looking for?

MR. CLARK

A minimal fine, Your Honour.

. . .

LYNCH, Prov. Ct.J.

Well the Court is influenced by a number of factors. It's influenced by the cost to the defendant as to work done, the removal of the work done. You know, I believe that if we're talking about the time that that bulldozer was in the area, that if the Court put an arbitrary figure of $5000.00, I'm sure that that would probably be more in the low end. And I think I'm influenced by that, and I believe the Crown is influenced by that, and I think that should be stated with regards to the sentencing. So we're looking here at what would be known as a token fine. The fine will be a fine of $100.00, in default 10 days in Provincial Gaol, and I'm making an order pursuant to Section 33(7), and the order is to cause the stabilization by the defendant of the excavation site, pursuant to the instructions of the Department of Fisheries and Oceans, and I so make that order.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. BELL

JOSEPHSON, Prov. Ct. J. Castlegar, June 21, 1984

***Fisheries Act*, R.S.C. 1970, c.F-14, as amended - Accused found guilty of charge under s.31(1), unlawfully carrying on work or undertaking resulting in the harmful alteration, disruption or destruction of a fish habitat - Central issue - Whether creek with substantial sportfishing value is a fishery within meaning of *Act* -**

The accused was charged under section 31(1) and section 33(2) of the *Fisheries Act*, R.S.C. 1970, c.F-14 as amended, for offences occurring on August 24, 1983.

Held, the Court found the accused guilty on the section 31(1) charge. The section 33(2) charge was dismissed.

The central issue addressed by the Court was whether or not a creek having a substantial sporting value is a fishery within the meaning of the Act.

The Court considered definitions of fishery appearing in two cases referred to by the Court of Appeal in *R. v. MacMillan Bloedel Limited*. Originally examined and adopted in the Supreme Court of Canada decision in *Dan Fowler v. The Queen*, (1980) 2 S.C.R. 213 and in the B.C. Court of Appeal decision in *Mark Fishing v. Fisherman and Allied Workers* Union (1972) 24 D.L.R. (3d) 585, the definition of fishery in *Patterson on Fishery Laws* is applied over the narrow definition of fishery in *Dr. Murray's New English Dictionary*. The Court held that Patterson's definition, which emphasizes a general right of catching fish, includes sports fishery whereas Dr. Murray's definition, which concentrates on the business of catching fish, does not. Thus the creek in question, is considered a fishery within the meaning of the Fisheries Act.

E.B. Johnson, for the Crown.
B.A. Lerose, for the Accused.

JOSEPHSON, Prov. Ct. J.

(Oral) The accused is charged with offences under Section 31(1) of the *Fisheries Act* of Canada and Section 33(2) of the *Fisheries Act* of Canada. At the time of the trial, I dismissed Count no. 2 against the accused. I dealt with various other submissions of Mr. Lerose on behalf of his client with respect to Count no. 1 and dealt with them adversely to him.

The one remaining issue with respect to Count no. 1 is whether or not the Crown has satisfied me beyond a reasonable doubt that Beaver Creek was a "fishery" within the meaning of the Fisheries Act of Canada. The Defence has quite properly conceded that Beaver Creek is a very active and productive sport-fishing creek. The issue then becomes whether or not a creek with a sport-fishery value only is a fishery within the meaning of the *Fisheries Act* or whether, in order to be a fishery, it must have a commercial value as well.

Both counsel have referred to and relied on various portions of the decision of our Court of Appeal in *R. v. MacMillian Bloedel Ltd.*, dated November 24th, 1983. The Court referred to the evidence as found by the trial Judge in that case. The evidence in that particular case was to the effect that the stream in question was a relatively small steam carrying a small species of fish of no sporting or commercial values whatsoever. It was found that such a stream was not a fishery within the meaning of the Act.

The decision of the County Court Judge was quoted with approval by the Court of Appeal at pages 4 and 5 of their decision. At page 5 they refer to the County Court decision, which holds as follows:

> "To be identified as a fishery the area involved in this appeal would have to contain fish having a commercial value, or perhaps a sporting value, or would have to form part of the habitat of the anadromous fish below the waterfalls."

An issue in this case is whether or not a creek having a substantial sporting value is a fishery within the meaning of the Act. This issue has not been clearly determined in the MacMillan Bloedel case because clearly, there was no sporting value whatever. The words used by the learned County Court Judge and adopted by the Court of Appeal lead to the confusion, those words being: "perhaps a sporting value".

The Court of Appeal refers to the Supreme Court of Canada decision in *Dan Fowler v. The Queen*, (1980) 2 S.C.R. 213. The case dealt with the issue of what is meant by the word "fishery". The decision refers to and adopts the definition of Patterson on Fishery Laws, which says as follows:

> "A Fishery is properly defined as the right of catching fish in the sea, or in a particular stream of water; and it is also frequently used to denote the locality where such right is exercised."

The decision then quotes from Dr. Murray's New English Dictionary, which contains the following definition:

> "The business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water."

The Court then refers to an earlier decision of theirs in *Mark Fishing v. United Fishermen & Allied Workers Union*, (1972) 24 D.L.R. (3d) 585, where Chief Justice Davey stated as follows at page 592:

> "The point of Patterson's definition is the natural resource, and the right to exploit it, and the place where the resource is found and the right is exercised."

The Court appears to have placed greater emphasis on the definition in Patterson on Fishery Laws.

I've referred to these in some detail for the reason that there appears to be somewhat of a conflict in Patterson and Dr. Murray's definition. Patterson's definition would appear to include a sports-fishery as clearly there was a right of catching fish in this particular creek and such right was frequently exercised. However, if Dr. Murray's definition is adopted, in my view, Beaver Creek would not be a fishery in the meaning of the *Fisheries Act*, because clearly taking fish for sport only is not a business, occupation or industry within the meaning of Dr. Murray's Dictionary. A valid and legitimate issue does arise in this particular case.

Drawing a distinction between commercial and sports fishing could be a difficult and often fruitless exercise. If I adopt the narrow definition of fishery as urged by the Defence, it is clear that none of the inland waters of this Province would be subject to the *Fisheries Act* unless fish were taken specifically for resale, which would be the case in very rare instances.

The other difficulty is that the lines frequently blur between sports and commercial values in any particular body of water in that there is often a fall-off commercial value to be derived from the sports fishery itself. In particular, tourism often depends primarily upon the value of the sports fishery. Can one then call that strictly a sports value or does it have a commercial value?

The distinction, in my view, is without a great significance. I will apply the definition of fishery as set out by Patterson on Fishery Laws and quoted with approval by the Supreme Court of Canada in *Dan Fowler v. The Queen* and in *Mark Fishing v. United Fishermen, supra*. It would appear to me from a reading of those two decisions that the emphasis was placed on Patterson's definition, although this particular issue was certainly not before them.

It is my decision that Beaver Creek, having a significant sports-fishing value, is a fishery within the meaning of the Fisheries Act, and I will find the accused guilty on Count no.1.

I do thank Counsel for their submissions; clearly they did identify this valid and legitimate issue that perhaps should be tested by way of an appeal.

BRITISH COLUMBIA PROVINCIAL COURT

R.v. BLUE LAGOON ENTERPRISES LTD. et al.

FRIESEN, Prov. Ct. J. Clearbrook, October 3, 1984

***Fisheries Act*, R.S.C. 1970, c. F-14 as amended - Accused charged with offences under section 33(2) - Depositing a deleterious substance into water frequented by fish - Woodwaste into Fraser River, and section 31(1), unlawfully carrying on a work or undertaking resulting in the harmful alteration, disruption or destruction of fish habitat - Technical defences including identification of parties and whether the material is deleterious or not, unsuccessful.**

Sentencing - Accused guilty of offences under section 33(2) and section 31(1) of *Fisheries Act* - Test case - Total fine of $500 levied.

During June of 1982, when the Fraser River rose to its usual high water line, it covered part of a waste pile of cedar wood and sawdust, which was part of the accused's operation. The material partially dammed a small creek flowing perpendicular to the Fraser. When the river level dropped, the soaked debris drained a brown liquid from the waste pile into the little creek and into small pools formed on the delta-like area.

Experiments were conducted on the site in March of 1983. Fish died within minutes in some of the standing pools and also within a hole dug near the creek. The on-site conclusions were corroborated by subsequent laboratory tests. The accused were charged with four counts under section 33(2) and one count under section 31(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14 as amended. If pure waste from the pile had not rendered the laboratory water toxic to fish, one might have concluded that the toxicity in the brown liquid had come from some unknown source beyond the control of the defendants.

Held, the accused was found guilty on one count under section 33(2) and one count under section 33(1).

Two counts under section 33(2) failed because there was insufficient evidence that the waste was deposited directly in the Fraser by the defendants during the period charged. A further count was dismissed because there was a finding of guilt on another count which was essentially the same charge. Although there were some minor errors in the manner in which the test was reported, the Court was satisfied that the test was done competently and that the results should be given considerable weight.

The Court held that the question of the identification of the parties had been established beyond a reasonable doubt. Evidence including markings on various stakes contained in the particular waste pile and accounts of meetings between fishery officials and the personal defendants, settled the identification issue to the Court's satisfaction.

The Court found that the river eventually picked up material from the foreshore and that fish habitat had been disrupted, especially in the little creek.

Fines of $250 on the 33(2) charge and $250 on the section 31(1) charge were levied against the company only, since this small company had suffered the penalty of a four day trial in what was a test case. The individuals involved received a suspended sentence.

D. Ross, for the Crown.
J. Richardson, for the Accused.

FRIESEN, Prov. Ct. J.

The main issue is whether the waste material from a shake manufacturing operation offends Section 31(1) and Section 33(2) of the *Fisheries Act*. There are five charges laid under those sections in this case.

There are some technical defences argued, namely, identification of the parties, whether the material is deleterious and if so, if it may enter water frequented by fish. For reasons which I will try to summarize later, these technical defences do not succeed and the Court is satisfied that Counts 3 and 5 have been proven beyond a reasonable doubt.

Counts 1 and 2 and 4 are dismissed. Counts 1 and 2 fail because there is insufficient evidence that the waste was deposited directly into the Fraser River by these Defendants during the period charged. Count 4 is dismissed because there is a finding of guilt on Count 3 which is essentially the same charge.

The waste material in question consists of cedar wood and sawdust which is carried by a conveyor from a building and dropped a short distance from the shore of the Fraser River. Over a period of time the pile has grown to the point where it sometimes encroaches below the usual high water line of the Fraser River during spring run-off. This material also partially dams a small creek about one foot wide and three inches deep flowing perpendicular to the Fraser River and next to this waste pile. Both the creek -- I should really call it a stream, it's a very small stream -- which had its origin as a storm drain and, of course, the Fraser River, are frequented by fish.

During June of 1982 the Fraser River, again, rose to its usual high point where the lowest part of the waste pile became partially submerged. Some waste floated away and other waste remained in the pile in a saturated condition. When the river level dropped the soaked debris drained a brown liquid into the little creek mentioned and into small pools that could form on the delta-like area which formed when the river level fell. I'm satisfied that brown material originated from the cedar waste pile.

Experiments conducted on the site on March the 23rd, 1983, established that the brown liquid was highly toxic to fish. The fish died within minutes of being immersed into some of these standing pools, or one of these standing pools within the delta area and also within a hole dug near this creek -- near the stream, I should say.

The experiments were conducted by competent Fisheries officials and technicians on the site in a manner which satisfied the Court that their conclusions are worthy of considerable weight. The on-site experimental conclusions can be said to be corroborated by subsequent laboratory tests conducted upon a sample of recently deposited unsoaked waste material similar to that found throughout the pile -- or I should say, representative of the waste material that comprises the pile.

The latter experiment was useful in the sense that if the pure waste from the pile did not render water toxic to fish in a laboratory experiment, one might conclude that the toxicity in the brown liquid had come from some other unknown source beyond the control of the Defendants.

Now the third count charges that between the 5th of April, 1982 and the 23rd of March, A.D. 1983, at or near the District of Mission, County of Westminster, Province of British Columbia, the Defendants unlawfully deposited a deleterious substance, to wit: wood waste, in a place and under conditions where the said deleterious substance or any other substance that resulted from the said deposit of such deleterious substance, may enter water frequented by fish, to wit: the Fraser River, contrary to Section 33(2) of the *Fisheries Act*, thereby committing an offence contrary to Section 33(5) (b) of the said Act. I'm satisfied that the findings of fact that I have made prove that charge beyond a reasonable doubt. The question of the identification of the parties has been established beyond a reasonable doubt. There were several meetings by various Fisheries officials at the site of this one waste pile. The focus of attention was always on the one pile that had this small stream coming from a storm drain and on many of those occasions one or other of the personal Defendants, Mr. Fred Buker, or Mr. Charles Buker, were present, either individually or together, and I'm satisfied that any dealings with them had to do with that particular waste pile, and that they exercised managerial functions with regard to that whole operation, and I'm satisfied that the markings on various shakes -- that all of the evidence when taken together proves the operation was that of Blue Lagoon Enterprises Limited and that the Bukers were the directors and operators of that mill.

With regard to the deleterious substance, an attack was made on the competency or the accuracy of the lab tests and there were some errors and they indicated that one must look carefully at these results, but I am satisfied that that waste material which was collected -- it was fairly fresh material -- produced a toxic fluid which, when mixed with water in various degrees, to various concentrations, had a very marked deleterious quality and the fish were in stress very quickly when this concentration reached twenty percent, and it was a good representation of what was actually happening in the fish habitat next to the pile. There were some minor errors in the manner in which the test was reported, but overall I am satisified that the test was done properly and competently and that the results should be given considerable weight.

With respect to Count 5, the charge is that they carried on an operation or an undertaking that resulted in the harmful alteration, disruption or destruction of fish habitat. The evidence does support that charge. The dumping of waste material between the period charged continued for a time and some of the material was fresh and found its way into the foreshore area, not necessarily the river as such, but the river eventually did pick up the material and it disrupted the fish habitat, especially in that little creek. There was evidence that it was actually partially dammed at times and to that extent that charge was proven beyond a reasonable doubt, so there will be a conviction on Counts 3 and 5.

I don't think it's necessary to repeat what Judge Paradis said in this North Vancouver case. He said at page 13 that:

> "It is not necessary to prove that the substance was, at the time of its deposit, deleterious, nor it is necessary to go so far as to show that it was the cause of the fish kill which occurred."

That's the case here.

Now, I don't know what the Crown wants to say on sentencing, we can proceed with that now, I'm prepared to go ahead.

. . .

MR. RICHARDSON

Your Honour, . . . is that a finding of guilt against all three Accused?

FRIESEN, Prov. Ct. J.

Yes. I am satisfied that the charges have been proven beyond a doubt against each of the three Accused. Whether there should be sentences against individuals or company, I'll leave that to the submissions of Crown and Defence.

. . .

SENTENCING

MR. ROSS

Regarding sentence, I would submit that the primary concept in imposing sentence in a case such as this is the concept of deterrence. There would not be a specific deterrence in this case as I understand it the Accused are not operating on that site any more; however, I would submit that the concept of general deterrence is an important one in this case as the problem of wood waste pollution is a serious one on this part of the Fraser River and there is a need to disuade others from commencing to do the same thing, and also to persuade mill owners presently operating to begin cleaning up their operations and cease discharging toxic wastes into the river.

I would also point out that in this case the Accused did not take any immediate or, indeed, any meaningful steps to rectify the problem after having been asked to do so by the authorities.

The other factor which I would submit is important in a case like this is the environmental impact of the deposit; however, the extent of the damage to the environment is difficult to measure in this case. I would submit, however, that the effects of the pollution were probably severe, both because of the size of the debris pile and the length of time over which the offence took place, and also there was probable serious effects to the fish habitat due to the size of the debris pile.

I have some other cases here where the accused have been found guilty under these sections. The first case is *Regina v. Pioneer Timber Company Limited.* In this case the accused were charged with permitting a deposit of sediment of a deleterious substance near a tributary stream under a condition in which the sediment entered water frequented by fish. While rebuilding an old logging road, some clay and gravel material on the lower side of the road — some clay was deposited above the head wall of the tributary stream. The following day during a spring thaw, a flood of water ran down the road surface and poured over the edge of the road, through the deposited material and into the stream. Two conservation officers found that what had been a clear stream the day before was now dirty, the sediment causing the water to become dirty came from the clay and gravel deposit.

The accused were found guilty in that case and a fine of three thousand dollars was imposed at the Provincial Court level. This is the Appeal Court decision in which the appeal was dismissed.

FRIESEN, Prov. Ct. J.

Was it a sentence appeal?

MR. ROSS

No, sorry, the conviction was upheld on appeal, Your Honour, it was not a sentence appeal.

The next case I have is *Regina v. Elk Oil Exploration*. In this case the accused was charged with committing a deposit of oil in a place where it entered water frequented by fish after diesel oil flowed from a ruptured fuel bladder and entered a water course. The accused was convicted in this case and there was a fine of two thousand dollars imposed.

And the last case I have is *Downey Street Sawmills Ltd.* This is a case in which the defendant company constructed a logging road and as a result of the construction of that road there was a slide and part of the material involved continued down the mountainside into the Eagle River. In this case the accused was found guilty on Count 1 only, which is 31(1), the harmful alteration of fish habitat section, and a fine of two thousand dollars was imposed.

I would submit that in a sense the case at bar is more serious than those referred in that it involved a continuing offence rather than an isolated occurrence such as this. I was unable to find any cases where it involved a continuing offence over a period of time.

I'd point out that the penalty for a contravention of Section 31(1) is a maximum fine of five thousand dollars for a first offence and that the penalty for a contravention of Section 33(2) is a maximum fine of fifty thousand dollars per day; however, we're not asking for anything like that.

I would submit that in this case a fine of deterrent nature in the range of two to three thousand dollars would be appropriate.

Thank you.

MR. RICHARDSON

Your Honour, first of all, I submit that the same, really, act that is the subject of Count 3 -- there's a common act for Count 3 and Count 5 --

FRIESEN, Prov. Ct. J.

Yes, I am not going to treat this case any more seriously because there are two counts that result in convictions. I think it's all really one operation that results in this problem.

MR. RICHARDSON

The only question I have, Your Honour, is whether --

FRIESEN, Prov. Ct. J.

I think the extent of the interference with fish habitat is very significant, I mean, if you have a very small stream that's been affected and you can be satisfied that only a small number of fish have been adversely affected, then it's a different problem altogether than if you were to affect the Fraser River in a substantial way.

MR. RICHARDSON

Well, Your Honour, my learned friend is making out that this has been a substantial effect on fish habitat and there may have been an effect -- Your Honour has found that there was an effect on fish habitat, but one must also, I submit, examine the evidence that indicates that the fish that were swimming right there were in a healthy state and it seems somewhat artificial to dig a hole and allow it to fill in from this stagnant water and then say that is is representative of what's really happening. I think that that is really going too far and really what it comes down to is that the stream that's being talked about was a storm sewer drain that was draining into the river. We don't really know if -- some of the same submissions I made still apply even on sentence -- we don't know really the extent of the pollution by this wood waste pile and, again, the same issue would also apply as to really how big, how serious an addition to the pollution problem was done or made by the Accused.

Your honour, the --

FRIESEN, Prov. Ct. J.

Could I make this suggestion? It's just a thought and it may not work at all, but if these people still have control over that site --

MR. RICHARDSON

They don't.

FRIESEN, Prov. Ct. J.

They don't. Well, then I can't make the suggestion. I was going to suggest that the appropriate penalty might be a clean-up of that operation so that there was no interference with fish habitat and if that could be easily done then that to me would be a far better remedy than a general deterrent. It would at least eliminate a continuing problem and be a better way of dealing with it.

MR. RICHARDSON

Your Honour, that is a real problem, you see, that is the problem, removing all that stuff is a huge problem. For instance, this really goes back too far, July 25, '77 was -- I think it was 3A. Now if that's the site, you can see that there's wood waste there, old wood waste on the site. Sure, there's an addition to it, but the whole side of the river is all wood waste, all this wood waste landfill. How much of it is supposedly the Accused's?

I can tell Your Honour that the Accused moved in or that the company started operations in October '81 and shut down in August of '83, and for the first six or nine months of that period, the mill, the General Cedar Products Limited mill was operating as well, they were not -- the Accused, Your Honour, neither of the Accused -- not one of the Accused is the owner of the property and this mill was leased out from time to time to different people, even during, even during the period of the indictment of the Information.

My instructions are that within one mile of this site there were many shake and shingle mills and much larger than this outfit over the last fifteen to twenty years where a huge waste pile had been deposited for years and years and years. My understanding is that a Hatzic Booming, Shakes and Mills created huge waste piles for fifteen or twenty years, Green River Shakes for fifteen years, Groenwal and Sons had mills on the site within a mile for forty years, that, in fact, a mill - mill operations took place along this General Cedar and -- General Cedar, that along there in the near vicinity of where Your Honour's found the Blue Lagoon mill site to be, that there have been mills starting there -- operating as early as 1909 and 1912, so how much of that should the Accused remove? When they were told -- when they were told, look, there's a problem, that's the first time they realized there was a problem, that there was a problem -- at least somebody said there was a problem. What are they supposed to do? I mean, in effect, it would have meant problably a million dollars to remove all the wood waste in the area and how do they know which is theirs?

They attempted to stop adding -- well, they did stop adding to the pile by having bins and they were taken away. The reason why this was stopped is not because the Accused did not wish it to happen, it is because the company -- there was no -- and the company that was taking away the material was no longer able to take away the material to the location where they had been taking it, they were not allowed to dump elsewhere. They aren't allowed to burn, they aren't allowed to dump, what are they to do? And it is a mammoth operation to remove the wood waste that is there.

So what in the end happened? Blue Lagoon shut down, that's what happened. They shut down and moved. And they moved to another location where they wouldn't have any possible problem at all with respect to Fisheries, but what problems did they get into? They get into air pollution problems and no one is prepared to give them designs for the furnace or the blast furnace, whatever you call it, the wood waste furnace, to get rid of this stuff. They have twenty-two men working in the operation from time to time. There's a fifty-three percent unemployment rate in Mission. What do they do? It's really -- it's a real problem and it's a problem which, I submit, is not going to be solved by merely hammering either Blue Lagoon Enterprises Ltd. or the individual accused persons.

I submit that these other -- my learned friend had some other cases and I must confess I would normally ask to come back and give you some cases and I don't have them because I didn't anticipate a decision today and to go on with sentencing, but my clients would like to have this matter dealt with.

I was advised by, I believe, my friend, and perhaps Mr. Teskey, that in many of these cases there are fines much lower than these, that these are not necessarily representative fines at all that he's produced in these cases. My learned friend can correct me if I'm wrong, but I understand we're talking more in the range of around twelve hundred dollars and that MacMillan Bloedel has not been fined more than two thousand dollars.

This is a small outfit. In the period of time Blue Lagoon was operating there they made an eighty-five thousand dollar loss. They are a father and son trying to eke out a living out of this and employ up to twenty-two men.

My instructions are that the Accused have tried and have investigated other ways of disposing of the waste through, for example, chipper, presto-log manufacturing and they're just -- they're at a dead end, so in the end they just shut down. They didn't know how to deal with it. They tried and they could not deal with it. It's not a simple solution to remove for the reasons I've just stated, because there's just -- the whole place is covered with -- is wood waste.

As I stated, in this photograph, July 25th, 1977, some, what is it now, seven years ago, there is wood waste with bushes growing right out of the wood waste area. Your Honour can see it here. This is clearly wood waste, it's older wood waste, but is indicates it's been there for a long time.

My client's instructions were that when they came there was already a huge pile of wood waste right there where Your Honour sees some of the pile. It's a real problem. There's no place to put this stuff, there's no place to dump it and you can't burn it unless you have a specific burner that's going to be efficient enough to heat up the material enough so that you won't have air pollution. The problem with that is there are no designs for the burners so what the authorities want the individual companies to do is, well, you build one and we'll tell you after you've built it all whether it's sufficient of not. They don't have any plans to say this is what you should be doing. For instance, when you have to put in a septic tank they say, now these are the specifications, you build it like that you'll be okay. There's nothing like that. Mind you, that's another type of problem which isn't really the crux of this case, but it indicates that what is a small operation supposed to do in these circumstances. There's a conflict of interest here. There's the interest of keeping twenty-two people employed, food on the table, kids clothed and sent off to school, etcetera, and on the other hand there is the very important issue of making sure that the environment isn't damaged.

Your Honour, I think, I would submit that if, indeed, the Accused took steps to remove, say, three hundred truckloads of that wood, I don't really think it would make much difference, and how long does a leachate, how long does a leachate cause, if it's being sitting there, it keeps on decaying and decaying and decaying. Sure, there is a faster production of leaching and sugar removal from the wood in the beginning, but there's been no evidence to suggest that there's no leachate production after the initial quick stage, and maybe from a layman's point of view, I would think that there would continue to be some form of leachate produced from old wood that just keeps on rotting and mixed with water and all the rest. Now, maybe I'm wrong, maybe that's just pure speculation, but there hasn't been any evidence, and there doesn't seem to be sufficient evidence to be able to ascertain how long the leachate problem exists. One hears about it when there are disputes about whether there should be a landfill site for a garbage dump and that's when --probably just in recent years that's when leachates have maybe become a little better -- people have become a little more aware of the problem.

The problem along -- to my clients -- it was not know to be a problem until they were told there is a problem, and yet it's kind of hard to see what the problem is when you think, well, gosh, wood on the bank of the river is going to cause a big problem, and it's something which people have to be educated about. They didn't go around pushing all this pile into the river and just get rid of it that way, they didn't go about trying to add to the problem, they tried to deal with it the best way they could. But whatever they did wasn't going to stop any leachate solution forming because the pile was already there; even if they took away huge truckloads by the hundreds, you're still going to have some sort of wood waste there.

They, in fact, move a large amount of wastes, despite what the Crown has to say, my instructions are they spent approximately four thousand dollars to remove wood waste and the problem was -- the reason why they were unable to keep going was that Davidson were no longer allowed to dump the wood waste where they were dumping it.

Your Honour, in my submission, this is a case where although Your Honour has found there has been some harmful alteration, disruption or destruction of fish habitat, I submit that the actual acts of the Accused were not done in any sense maliciously or recklessly or in any way that would indicate a complete disregard of the problem. It was kind of -- they were made aware of a problem that they didn't know how to solve. That's really, I submit, the situation, and that this is a first offence and I would submit this is a situation where the company should be, if there is to be a fine, that it be a modest fine, having regard to the -- to, really, the size of the operation; it is not a big mill. One can see that -- my instructions are that there are two -- there were two saws going at this mill and that there are presently other mills on the site now that are bigger than this mill was -- oh, I'm sorry, I understood that there were four saws in the new mill.

FRIESEN, Prov. Ct. J.

Are you saying that this pile is getting even bigger now?

MR. RICHARDSON

It's getting bigger now. From another point of view I guess you might say, well, maybe I better deter the public, but the point is that the problem is still the same. I suppose -- maybe these people are dealing with it in such a way that they're piling the wood on the other side of the building so that it's far enough away from the river that it's working out all right, and maybe they can take the excuse, well, we didn't put that pile there, and so they can carry on without being bothered, but my clients shut down because they couldn't deal with it any other way. They didn't wish to continue a problem, and I might say, they shut down in August of '81 before they were prosecuted, before they were summonsed. The Summons is dated November of 198 --

FRIESEN, Prov. Ct. J.

The information was sworn November the 8th, '83.

MR. RICHARDSON

Yes, '83. And they shut down in August of '83, so I submit that the Crown is incorrect in saying that they took no steps. As I stated, they tried to remove it, they ran into a roadblock, they couldn't. They tried and investigated all other ways of disposing of it. They tried even investigating the idea of chippers and presto-log manufacturers; when none of these were viable they shut down.

Your Honour, in addition, the Accused have had to incur the expense of really being defendants in what appears to be -- what they have been informed to be -- is a test case, and in that regard they've -- I submit the test case has been -- perhaps today is my fault that I've been long winded, but I would say that this case has taken far longer than it needed to in regards to the giving of the evidence, and much of the evidence has been, in the end, ruled inadmissible. And they've had to incur a large expense because of the protracted nature of the proceedings in this case. I submit that that is a factor that your Honour can take into consideration. It's been a case that's been expensive to them. It's a case that forced them to close down and move elsewhere and try to deal with -- to continue to eke out a living in the industry that they've known and that they're involved in. And I submit that this is not a large operation, it's a small family business which employs local people, and it in no way can be compared to a large operation such as MacMillan Bloedel almost a multi-national huge corporation that has the financial ability maybe if they were there, to dig out the whole area and remove everything, and yet in those cases, the large company, the maximum fines that we're seeing are two thousand to five thousand dollars. I would submit that a more appropriate fine here would be under a thousand dollars, having regard to the expenses that have been incurred by the Accused and the fact that they have not disregarded the problem and, in fact, that they have shut down the operation and it is not a continuing situation.

I submit that the fine should be less than a thousand dollars and I would ask that the -- I submit that a proper fine should be levied against the company rather than the Accused, who were only acting as Directors of the corporate Accused.

MR. ROSS

If I could just say one thing, Your Honour. I have to comment on the -- I'm not certain where my friend got this information about the average fine being twelve hundred dollars, but it certainly wasn't from me. In my review of the cases the average fine was in the two to three thousand dollar range and those cases were indicative of that if there is such a thing as an average fine in a case like this. In addition, I noted many cases in which much higher fines were imposed, so I would submit that that's not the maximum and higher fines have been imposed, although we're not asking for one in this case.

FRIESEN, Prov. Ct. J.

I think it is very significant here that it was a very lengthy trial, that this has been a very old problem that is now being dealt with and that this may be a sort of test case for this huge problem that exists along the banks of the Fraser River. A four day trial in itself is quite a penalty to suffer if you're being singled out in a large group to be the testee of this kind of a case, and so I'm going to impose a fine against the company only and suspend sentence with respect to the individuals. The fine I'm going to impose is five hundred dollars in this case. Every case has its own peculiar facts and I don't think that this is as flagrant a case as it could be and it's not the kind of a case where there should be a very heavy penalty imposed against this particular defendant. The solution is a very complex one and not one that can be readily solved even with large fines. I think the principle has been established that these waste piles can cause a problem to the fish habitat and in this case did.

I don't know if there needs to be a Probation Order that accompanies a suspended sentence. I'd just as soon not bother with the probation period, although I might have to specify a period in the sentencing. There will be a six month period of probation without supervision and that simply means that if you fail to keep the peace and if you're not of good behaviour, or if you're convicted of any other offences during the next six months as individuals you could be brought back for sentencing on this charge.

I said five hundred dollars against the company, in default distress, did I?

(Editor: It was clarified that the fine was two hundred and fifty dollars on each count, for a total of five hundred dollars).

BRITISH COLUMBIA PROVINCIAL COURT

R. v. BRITISH COLUMBIA RAILWAY CO.

MacARTHUR, Prov. Ct. J. Prince George, December 14, 1983

***Fisheries Act*, R.S.C. 1970, c.F-14 as amended - Accused charged with offences under section 33(2) - Depositing a deleterious substance into water frequented by fish - Muddy and silty conditions observed in fresh water creeks as they passed through defendants contruction site - Creeks eventually led to Table River, the body of water named in information - Crown fails to establish burden of proof that silt actually entered the Table River.**

Conservation officers observed a clear fresh water creek becoming muddy and silty as it approached and passed through the defendant's construction site near kilometer 35 on one of its branch lines. Similar conditions were observed in another creek near kilometer 42, a site on the same line. Both creeks lead to the Table River which is a tributary of the Parsnip River.

The accused was charged with 2 counts of permitting the deposit of a deleterious substance into water frequented by fish, contrary to section 33(2) of the *Fisheries Act, R.S.C. 1970, c.F-14 as amended*. The information named the Table River as the body of water frequented by fish.

Held, the Court dismissed both counts.

Due to the wording of the information in this case the Crown had to prove beyond a reasonable doubt, not simply that silt had entered the creeks which flow into the Table River, but that the silt, in fact, had entered the Table River. The Crown's evidence, at best, amounted to what probably occurred and not what has been established to have occurred.

D. Kennedy, for the Crown.
G. Switzer, for the Accused.

MacARTHUR, Prov. Ct. J.

The defendant stands charged as follows: Count 1, British Columbia Railway Company on or about the 9th day of June, 1982 near Kilometer 35 on the British Columbia Railway Tumbler Ridge Branch Line, in the Province of British Columbia, did permit the deposit of a deleterious substance into water frequented by fish, to wit the Table River, contrary to Section 33(2) of the Fisheries Act.

Count number 2. British Columbia Railway Company on or about the 9th day of June, 1982 near Kilometer 42 on the British Columbia Railway Tumbler Ridge Branch Line, in the Province of British Columbia did permit the deposit of a deleterious substance into water frequented by fish, to wit the Table River, contrary to Section 33(2) of the Fisheries Act.

The charges arose out of the construction by the defendant of a railway line to Tumbler Ridge in the Province of British Columbia and were brought about as a result of an inspection conducted by a Conservation Officer at locations described as Kilometer 35 and Kilometer 42 respectively, near Anzac, British Columbia, on June 8th and 9th, 1982.

The evidence, in summary, as emerges from the oral evidence, photographs and diagrams indicates at Kilometer 35 a clear fresh water creek becoming muddy and silty as it approached and passed through the defendant's construction site and continued on its course to the Table River, which is a tributary of the Parsnip River. In particular, the creek is described to pass through a culvert which ran across the railway grade and then above ground between two areas of waste over burden, through another culvert under an access road, and then resuming its natural course. The Conservation Officer took water samples, both upstream and downstream, of the undertaking, and an analysis of the samples by a Marine Biologist indicates that siltation in the water increased approximately 3,000-fold as it passed through the construction area. The photographs indicate that a great deal of waste over burden likely sloughed off into the creek as it passed between the railway grade and the access road.

A similar condition was described at Kilometer 42 with respect to another creek which passed through the undertaking, with the added factor that two caterpillar tractors were observed in the location on the right-of-way apparently working near to an area where there had been a disturbance in the ground surface over which the creek flowed. Again, water samples indicated an increase in siltation nearly as dramatic as that taking place at Kilometer 35.

There is no issue, in my view, but that the defendant having charge of the undertaking, permitted the deposit of silt into the respective creeks.

The issues which have been addressed are;

(a) whether the silt deposited is, in fact, a deleterious substance as defined by Section 33(11) of the Fisheries Act,

(b) if so, whether such substance was, in fact, deposited into the waters referred to in the information, that is, the Table River,

(c) if both (a) and (b) can be answered in the affirmative whether the defendant exercised reasonable are to avoid this occurrence. The determination of any of these issues in favour of the defendant negates liability.

I propose to consider the second issue first. The argument of the Crown on this point with respect to Count number 1, that is Kilometer 35, is as follows;

(a) there is evidence that the creek at this location was clear and unadulterated before it entered the construction site, and that siltation in the creek increased 3,000-fold after it left the site,

(b) there was no evidence of the phenomenon of ponding, and given that the creek takes a rapid downhill course to the Table River, the inference is inescapable that at least some of the silt, in fact, reached the Table River.

(c) although the Conservation Officer did not walk to the confluence of the creek and the river on the date in question, an aerial photograph taken approximately ten days later shows the water entering the river to be apparently silted.

The argument of the Crown in respect to Count number 2, that is Kilometer 42, is essentially the same, with the exception that there is no aerial photograph at this location.

The arguments presented by the Defence on this point are that it would be difficult for the Court to conclude beyond a reasonable doubt that the silt deposited by the defendant, in fact, reached the Table River, for the following reasons;

(a) there is evidence that the respective creeks had to travel approximately one to one and one-half kilometers from the point where the downstream samples were taken to the river,

(b) there is really no clear evidence as to the precise course of these creeks and the Crown evidence does not obviate natural filtration occurring at, for example, sink holes where the water flows underground, or the phenomenum of settling,

(c) there has been no evidence presented as to the scientific, physical characteristics of siltation, and affects such as filtration or settling other than those opinions ventured by the Marine Biologist whose evidence may well be beyond the parameters of his expertise,

(d) there is no evidence that the siltation shown in the aerial photograph, Exhibit 3, can be shown to be attributable to the undertakings of the defendant on June 8th or 9th, or indeed at anytime, or whether such siltation, in fact, was occurring naturally,

(e) there is evidence from Mr. Houg, the defendant's foreman, that he walked some distance downstream at Kilometer 42 and, according to his evidence, the creek at this point was almost clear, which tends to support a hypotheses that there was a filtering or settling effect taking place.

It is incumbent upon the Crown to prove this ingredient and all other ingredients of the offence beyond a reasonable doubt. Having done so, the burden shifts to the defendant to establish on the balance of probabilities that they have shown reasonable care, Regina v Sault Ste Marie. The Crown, having worded the Information in the manner it did, must prove beyond a reasonable doubt, not simply that silt entered the creeks which flow into the Table River, but that the silt, in fact, entered the Table River.

Section 33(2) under which the defendant stands charges reads as follows;

> "Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or other deleterious substance that results from the deposit of such deleterious substance may enter any such water."

In my view, had the Crown charged in accordance with the latter wording of the Section, that is, "With depositing a substance in any place or condition where such substance may enter," the Table River, there may well be no issue, but on the Information before me I do concur with the arguments advanced by the Defence and thus entertain a reasonable doubt. In the absence of cogent evidence as to the precise physical and scientific characteristics of siltation, the Crown's case, at best, amounts to what probably occurred and not what has been established to have, in fact, occurred beyond a reasonable doubt.

Accordingly, the Court is not required to consider the remaining issues, and Counts 1 and 2 are dismissed.

NEWFOUNDLAND COURT OF APPEAL

R. v. BURTON

GUSHUE, J.A.,
MIFFLIN, C.J.N.,
MORGAN, J.A. June 23, 1983

Constitutional law - *Charter of Rights* - Search and Seizure - *Fisheries Act*, R.S.C. 1970, c.F-14 and amendments thereto, providing that Fishery Officers may search any building, vehicle, vessel or place other than a permanent dwelling place where he believes on reasonable and probable grounds that any fish taken in contravention of the Act is concealed therein - Evidence that Fishery Officer had reasonable and probable grounds - Search not in contravention of Charter guarantee.

This is an Appeal by the Crown from the accused's acquittal in a Provincial Court, on a charge of possession of undersized lobster contrary to section 4 of the *Lobster Fishing Regulations*, C.R.C. 1978, c.817, thereby committing an offence contrary to section 61 of *the Fisheries Act*, R.S.C. 1970, c.F-14 and amendments thereto. The Court ruled at trial that evidence demonstrating that the accused's lobster boxes contained undersized lobsters, was inadmissible since it was obtained as result of a Fishery Officers search without a warrant.

This interpretation of section 35 of the *Fisheries Act*, was rejected by the Court of Appeal and the order dismissing the information was set aside. The matter was remitted to the Provincial Court judge to admit the evidence and continue the trial.

The Court of Appeal interpreted section 35 as providing that Fishery Officers may enter and search any other private property, other than a dwelling-house, without a search warrant. The Court held that to make a lawful entry, the Fishery Officer must have reasonable and probable grounds to believe that fish, taken in contravention of the Act or regulations made thereunder, may be found therein.

G. Sweezey, for the Crown, appellant.
B.A. MacAdams, for Accused, respondent.

MORGAN, J.A.

This appeal is taken by the Crown by way of stated case against the decision of Provincial Court Judge Woodrow wherein he acquitted the accused Gordon Burton of the charge of having in his possession lobsters that were less than 3 and 3/16 inches in length contrary to s. 4(a) of the *Lobster Fishing Regulations*, C.R.C. 1978, c. 817, as amended, thereby committing an offence punishable under s. 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended.

The provincial court judge stated the following facts to this court:

1. I found as a fact that at approximately 6 p.m. on the 18th day of June; A.D., 1982 Fishery Officers Harvey Horwood and Clarence Mitchell were on a routine coastal fisheries patrol of Notre Dame Bay, near Twillingate, Newfoundland.

2. I found as a fact that they had received complaints that undersized lobsters were being sold in the Twillingate, New World Island, area of Newfoundland, and they accordingly were checking lobster boxes in the area: Fishery Officer Horwood had, in particular, received a complaint from a reliable and confidential source that the accused, Gordon Burton, was selling such small lobsters.

3. I further found as a fact that Fishery Officer Horwood did not know exactly when the said complaints arose but they came in sometime before the date of June 18, 1982, and therefore there was no question of exigent circumstances in this case: Fishery Officer Horwood had time to obtain a judicially authorized search warrant to search said Gordon Burton's lobster boxes.

4. I further found as a fact that said Fishery Officer Horwood conducted a search of said Gordon Burton's lobster boxes under Section 35 of *The Fisheries Act*, R.S.C. 1970, c. F-14, as amended, without first having obtained a judicially authorized search warrant.

5. I further found as a fact that in the course of said coastal fisheries patrol Fishery Officer Horwood and Fishery Officer Mitchell searched 10 lobster boxes for undersized lobsters - those less than 3 and 3/16 inches in length - and found such undersized lobsters in every box including two lobster boxes belonging to the accused Gordon Burton.

6. I further found as a fact that the lobster boxes of said Gordon Burton in which said undersized lobsters were found were not "a permanent dwelling place" under Section 35 of *The Fisheries Act*, R.S.C. 1970, c. F-14, as amended, and said lobster boxes were anchored offshore in Notre Dame Bay 100 feet from the said accused's home.

7. I further found as a fact since said accused, Gordon Burton, was not present at the time of the search, it was conducted in his absence: shortly afterwards, the said accused appeared on the shore and came down by the boat being used by Fishery Officer Horwood and Fishery Officer Mitchell on their patrol.

8. I further found as a fact that Fishery Officer Harvey Horwood was acting in good faith when he conducted his aforesaid search of the Accused's lobster boxes believing in fact that he had authority to do so under Section 35 of The Fisheries Act without a search warrant.

The findings of law made by the trial judge were: That fishery officers require a judicially authorized search warrant in order to conduct a search under the authority of s. 35 of the *Fisheries Act* as amended; that the warrantless search of the accused's lobster boxes was unlawful and the evidence that the boxes contained undersized lobsters was illegally obtained; that the unlawful searching of the Accused's lobster boxes without a warrant violated the Accused's right to be secure against unreasonable search under s. 8 of the *Canadian Charter of Rights and Freedoms*, and, that the evidence thus obtained was inadmissible in that the admission of such illegally obtained evidence would bring the administration of justice into disrepute. There being no other evidence adduced the trial judge dismissed the charge (40 Nfld. & P.E.I.R. 335).

The trial judge's ruling that the evidence obtained as a result of the search was inadmissible was based on his interpretation of s. 35 of the *Fisheries Act* and, at the request of counsel for the Crown, he reserved the following question for the opinion of this court:

> Did I err in law in holding that Fishery Officer Harvey Horwood required a judicially authorized search warrant in order to conduct a lawful search of Gordon Burton's lobster boxes under the authority of Section 35 of *The Fisheries Act*, R.S.C. 1970, c. F-14, as amended.

Section 35 of the *Fisheries Act* provides:

> 35. Any fishery officer may search or break open and search any building, vehicle, vessel or place other than a permanent dwelling place where he believes, on reasonable and probable grounds, that any fish taken in contravention of this Act or the regulations, or anything used in contravention thereof, is concealed.

The right to enter on private property and search in an extraordinary remedy in derogation of common law rights of ownership and empowering statues are subject to a strict construction. However, courts must give effect to the clear and express language of the statute. In this case, counsel for the respondent contends that because the authority to search was not expressly stated to be "without a warrant" the court should assume, as did the trial judge, that a fishery officer can only enter on private property and search in accordance with the provision of the Act after he had first obtained a warrant to conduct the search.

I do not accept that argument. It is one thing to put in or take out words from a statute to express more clearly what the Legislature did say, or must from its own words be presumed to have said by implication; it is quite another matter to amend a statute to make it say something it does not say. It is the duty of the court to interpret a statute, not to amend it.

In this case, s. 35 of the Act, by implication, provides that a fishery officer, having first obtained a search warrant, may lawfully enter and search a dwelling-house. In clear and unambiguous language, however, that section provides that the same officer may enter and search any other private property without a search warrant. To make his entry lawful, however, he must have reasonable and probable grounds to believe that fish, taken in contravention of the Act or regulations made thereunder, may be found therein.

In this case the trial judge found as a fact that the fishery officer had reasonable and probable grounds to believe that fish taken in contravention of the Act would be found on the property in question, as indeed they were. The search was therefore lawful and not in contravention of s. 8 of the *Canadian Charter of Rights and Freedoms*.

I would accordingly answer the question reserved for our opinion in the affirmative.

The appeal is accordingly allowed, the order dismissing the information is set aside and the matter remitted to the provincial court judge to admit the evidence and continue the trial.

Appeal allowed.

MANITOBA PROVINCIAL COURT

R.v. CANADA METAL CO. LTD.

NORTON, Prov. Ct. J. Winnipeg, February 28, 1985

***Clean Air Act*, S.C. 1970-71-72, c.47, as amended - Accused charged with exceeding the maximum limits of air contaminants as set by the *Secondary Lead Smelter National Emissions Standard Regulations* - Regulations validly passed - Governor General in Council had sufficient evidence of toxic lead as an air contaminant - Accused acquitted on grounds that test results were unreliable thereby raising a reasonable doubt on evidence for purpose of conviction.**

The accused was charged with emitting lead oxide particulates beyond the maximum limits set by the "*Secondary Lead Smelter National Emission Standard Regulations*" passed pursuant to the *Clean Air Act*. The Crown relied on results from tests completed at the request of Environment Canada. An independent firm conducted the tests in the presence of an Environment Canada official.

Two Defences were raised by the accused. Firstly, they challenged the validity of the regulations on the ground that they were passed without sufficient evidence of toxicity as an air contaminant, to the degree required by section 7(1) of the *Clean Air Act*. Section 7(1) permits the Governor in Council to prescribe national emission standards establishing maximum quantities of air contaminant "which would constitute significant danger to the health of persons." Secondly, the accused also claimed that the test results were unreliable so as to raise a reasonable doubt on the evidence for purpose of conviction.

Held, the accused was acquitted.

The Court held that while there was no scientific proof of a "significant" danger to the health of persons, there was sufficient evidence of the apprehended danger. Thus, the Governor in Council had sufficient evidence of toxic lead as an air contaminant to constitute a significant danger to the health of persons.

With respect to the issue of reliability, the Court found that the code of procedures prescribed in a Department of Environment report had not been followed throughout the testing. The Code is there to be followed and adhered to unless there are compelling reasons for any departure. Since no reasons compelling or otherwise were given for the departure in this case, it left room for doubt in the reliability of the test results.

Peter M. Kremer, for the Crown.
W.L. Ritchie, Q.C. and **D.N. Abra**, for the Accused.

Norton, Prov. Ct. J.

The Canada Metal Company Ltd. is charged as follows:

"THE CANADA METAL COMPANY LIMITED, the operator of a stationary source of a class in respect of which a national emission standard has been prescribed pursuant to

Section 7 of the Clean Air Act, to wit: a secondary lead smelter located at 1221 St. James Street, in the City of Winnipeg, in the Province of Manitoba, or on about the 23rd and 24th days of June, 1980, both dates inclusive, at or near the City of Winnipeg aforesaid unlawfully did operate the said stationary source in a manner that resulted in an emission into the ambient air in contravention of the national emission standard therefore as contained in the *Secondary Lead Smelter National Emissions Standards Regulations* made under the *Clean Air Act*, contrary to Section 9(1) of the Clean Air Act thereby committing an offence contrary to Section 33 of the said Act."

The above charge arose out of a test of the lead oxide furnace of Canada Metal Co. Ltd. (referred to hereafter as the Company) at its Winnipeg plant on June 23rd and 24th, 1980. The testing was done at the request and direction of Environment Canada, a department of the Government of Canada.

The firm of Beak Consultants Ltd. of Calgary carried out the tests and compiled the analysis of the tests. According to the test results, the lead oxide particulates being emitted, exceeded the maximum limits set by the "Standard Lead Smelter National Emissions Standard Regulations as amended February 11th, 1980, passed pursuant to the *Clean Air Act*. Chap. 412, Statutes of Canada. The Regulations as amended, became effective February 11th, 1980." The Regulations provided that the test should be carried out "in accordance with the method described in the Department of Environment Report EPS-1-AP-78-3 entitled "*Standard Reference Methods for Source Testing and Measurement of Emissions of Particulate Matter and Lead from Secondary Lead Smelters dated May, 1979*".

The test was carried out by a Mr. Allan Lanfranco of Beak Consultants Ltd., in the presence of Mr. Allan Edwards of Environment Canada, as the designated inspector, pursuant to the Regulations.

Canada Metals Co. Ltd. pleaded not guilty to the charge and its defence rests on two points:

I. The Governor-in-Council, by virtue of Section 7(1) of the *Clean Air Act* may prescribe national emission standards establishing maximum quantities, if any, and the concentrates of such air contaminant that may be emitted into the air by stationary sources of such class or classes which would constitute significant danger to the health of persons.

The defence contends that there was no evidence put forward by the Crown that when the Regulations became law in 1976, that there was any evidence of lead oxide emission into the ambient air that would constitute a "significant danger to the health of persons." In other words, the condition precedent has not been met.

The defence emphasizes "significant" and since the Crown could not produce any evidence, pursuant to a subpoena served by the defence, that the Government of Canada had anything more than concern about the effects of lead oxide as an air contaminant, and with no hard evidence to substantiate such concern, the Regulations are therefore invalid.

II. The methods of sampling employed by Beak Consultants Ltd. at the Canada Metals plant on June 23rd and June 24th, 1980 were not in strict compliance with the method described in Department of Environment Report EPS-1-AP-78-3, and therefore, the results are unreliable to the extent as to cast a reasonable doubt on the report on which the Crown relies for a conviction.

The defence contends that a finding in favour of Canada Metals Co. Ltd. of either or both of these grounds calls for an acquittal of the charge.

I will deal firstly with the validity of the Regulations.

Dr. A.J. Liston of the Federal Department of Health testified about the effects on health of lead from all sources, including airborne lead. Dr. Liston, a biochemist, has been with the Federal Department of Health since 1964. He was an advisor to the Department of Environment of Canada between 1972 and 1974. He had nothing to do with formulating the Regulations under consideration in this case. He was, however, involved in his capacity as an advisor to the Department of Health in discussions about whether lead in the atmosphere constituted a health hazard as to be a significant danger to the health of persons generally. His evidence was that at that time there was a considerable body of scientific and medical data that the major source of toxic lead was from food followed by water and air, in that order. To put it succinctly, the scientific community was concerned about its effect on people of all ages once ingested into the body, and how to best control it at the source.

Judging from the evidence of Dr. Liston, there appears to be no doubt about the toxic effect of lead once it has been ingested into the body. He described the effects on the body ranging from loss of appetite, progressing up to scale of severity to that of being fatal. The segment of the population that appeared particularly vulnerable were young children and pregnant women.

The evidence of Dr. Liston along with numerous documents subpoenaed by the defence from the Department of Health, presents a compelling argument that while there was no scientific proof of a "significant" danger to the health of persons, it would be imprudent, in fact, unresponsive to apparent danger to health of Canadians, for the government to delay taking any action because it lacked proof positive. There was sufficient evidence of the apprenhended danger.

I would therefore hold that the Governor-in-Council had sufficient evidence of toxic lead as an air contaminant to constitute a significant danger to the health of persons, and the Regulations were therefore validly passed and promulgated.

If I should be wrong in the above conclusion, I rely on as an authority *R.* v. *Heppner*, Minister of Environment of the Province of Alberta, (1977) 80 D.L.R. (3d) p. 112. A portion of the judgement reads as follows:

> "A court when considering the validity of subordinate legislation, must proceed on the assumption that such legislation is within the authority conferred by the Act and will not declare it invalid unless there is clear evidence to support such a find."

The Court cites with approval *McEldowney* v. *Forde*, 1969, 2 A.E.R., 6039:

> "When the minister has made a regulation, and purports to have it made under 1(3) of the Act, the presumption of regularity (*omnia proesumuntive rite essa acta*) applies and the regulation is assumed *prima facie* to be *intra vires*. But if the validity of the regulation is challenged, and it is contended that the

> regulation was otherwise than for the specified purposes, the courts will have to decide the issue, however difficult the task may be for them in some circumstances."

I find there was no evidence to support a finding that the condition precedent for the promulgation of the Regulations was absent. I find also the Regulations are within the authority conferred by the Act.

I will now deal with the defence issue that the test results were unreliable so as to raise a reasonable doubt on the evidence for purpose of conviction.

The prosecution is by way of summary conviction under the *Clean Air Act*, therefore, any conviction must be on proof beyond a reasonable doubt.

Pursuant to a letter dated April 16th, 1980 from the director of the Department of Environment for Manitoba on behalf of the Minister, the Company was directed to produce an emission test report of its lead oxide production from its Winnipeg plant, giving June 30th, 1980 as the deadline within which to carry out the emission test. The letter further instructed the test to be carried out according to the Department of Environment Report EPS-1-AP-78-3 (referred to hereafter as the Code). By letter dated April 28th, 1980, the Company agreed to carry out the collection and analysing of the gas stream samples taken as directed.

Reference was made throughout the trial to Exhibit 14 (referred to earlier as the Code). This is an information book produced by Environment Canada. On the face cover it states:

> "Standard Reference Methods for Source Testing: Measurement of Emissions of Particulate Matter and Lead from Secondary Lead Smelters."
>
> Regulations, Codes and Protocols Report EPS 1-AP-78-3
>
> Air Pollution Control Directorate June 1979.
>
> The Forward contains the following:
>
> "The methods described in this report, are used in conjunction with those described in Report EPS 1-AP-74-1 to determine the quantity of particulate matter and the concentration of lead in such matter that may be emitted from secondary lead smelters." (The Report EPS 1-Ap-74-1 was filed as an Exhibit).

It is this document to which those making the tests of lead smelters must look to and observe to obtain a consistency in the sampling process to ascertain if the levels of particulate matter or concentration of lead in the particulate matter emitted into the ambient air exceed the maximum limit set by the Regulations. The Regulations are specific that those levels shall not exceed:

"(a) 0.046 grams per normal cubic metre (0.020 grains per standard cubic foot) from operations involving the use of blast furnaces, cupolas or reverberatory furnace, or

> (b) 0.023 grams per normal cubic metre (0.010 grains per standard cubic foot) from operations involving the use of holding furnaces, kettle furnaces or lead oxide production units of involving scrap and material handling, crushing, furnace tapping, furnace slagging, furnace cleaning or casting, whether emitted separately or in combination with emissions from other sources,".

measured dry and undiluted in accordance with the method described in the Code.

In the course of the evidence, this document is constantly referred to with respect to the sampling process. There was considerable difference of opinion about the results if the Code was not adhered to by the person carrying out the sampling process. If there was a departure from the Code, can it be said that the results can be relied upon to support a conviction?

From the evidence, it appears that the Department of Environment advised which companies were available and equipped to do proper testing and from these names the Company could chose. It did in fact chose Beak Consultants Ltd. of Calgary, which company had done the prior test for the Company.

Three tests were carried out by Mr. Allan Lanfranco, an employee of Beaks, on June 23rd and 24th, 1980. Pursuant to the Regulations, Mr. Edwards of Environment Canada was present at the time as the inspector. According to the tests carried out by Beaks, the results show that the lead oxide emissions exceeded the maximum limits set by Sections 4 and 5 of the Regulations.

To deal with the defence position, the Regulation as amended February 8th, 1980 state:

> "4. The quality of particulate matter emitted into the ambient air by a secondary lead smelter shall not exceed.
> (a) . . .
> (b) . . .
> measured dry and undiluted in accordance with the method described in Department of the Environment Report EPS-1-AP-78-3 entitled 'Standard Reference Methods for Source Testing: measurement of emissions of particulate matter and lead from secondary lead smelters', dated May 1979."

In the Beak Report (Exhibit 7), under the heading Methods, is the following comment:

> "Sampling conducted where possible in strict adherence to the methods stipulated in the Environment Canada Standard Reference Method for Testing."

Mr. Lanfranco in his cross-examination stated:

> "Q. And with regards to the next page under 'methods', "Sampling was conducted, where possible, in strict adherence to the methods stipulated in the Environment Canada Standard Reference Method for Source Testing . . ." Just stopping there for a moment, that is false, isn't it?"

> "A. Yes."

Mr. Lanfranco admitted in his evidence that the prescribed procedures that were not followed were:

1. A final leak test as prescribed was not conducted.
2. Readings were not recorded every 15 minutes as prescribed.
3. A stainless steel probe was used instead of the prescribed pyrex probe.
4. Only one gas analysis per test may have been carried out.
5. Isokinetic variations calculated for each sample point did not all fall within the prescribed range of 90° - 110° F

Mr. Allan Edwards, Chief of Air Pollution Control for western and northern region of the Environment Protection Service, as stated earlier was the designated inspector present during the test. He stated that his purpose in being there was to make sure the method used by the consultants (testing company) were in compliance with the prescribed methods and prodcedures. His opinion was that they were followed despite the evidence of Mr. Lanfranco. It was his opinion that the departure from the prescribed methods as indicated would not affect the test results. These were referred to also as "deviations" or "variances". Mr. Edwards, if I correctly understand his evidence, is that if he views the variances from the prescribed methods or procedures to be insignificant, then the methods are sufficiently adhered to, to the extent the results will not be biased.

Dr. K. Peters testified as an expert witness on behalf of the defence. He has had a wide experience in iskonetic sampling. His opinion was that if the Code is not adhered to strictly then the results could be biased to the extent that higher results may be obtained. He admits that he cannot point to a particular instance where the Code was departed from, that the results in the Beak Report are inaccurate, but he does emphasize that if there is a departure from the Code, the test results are invalid, in his opinion.

Dr. James Smith testified as an expert witness on behalf of defence. He is a qualified expert on air filtration sampling with regard to air quality measuring and monitoring in lead refineries. Dr. Smith takes exception firstly to the form in which the Beak report was prepared, particularly where the names appear that it was prepared and approved by Messrs. Zaretsky & Howell, respectively, that it was not signed by either, and therefore, there is no way of knowing if two men are accountable for the results of the report.

The next objection of Dr. Smith is under the heading "Methods". Contrary to what is stated by the author for the report, the methods stipulated were not observed, where possible, in strict compliance. In other words, his view is that there is nothing in the report to indicate it was not possible to strictly adhere to the Code. With respect to the report, in its preparation, in his view, it is not a comprehensive one and a report that was not competently prepared.

Apart from the preparation form of the report, Dr. Smith is of the view that the variations or departures from the Code that are admitted by Mr. Lanfranco, are sufficient when taken together to cause concern about its dependability. He stated in his evidence regarding the Code:

> "They are intended to guide people in the field whose educational level may be weak to do exactly what is right, to get exactly the right result which can be presented in court as evidence and which no one can question as deviated in any way from the prescription within the Code."

Under thorough cross-examination, Dr. Smith admitted that he could not definitely say that any of the departures from the Code had biased the results to any particular degree, but because the code methods were not adhered to, it casts doubt on the reliability of the results contained in the report. In summary, his opinion, as was that of Dr. Peters, the code is there to be followed without deviation, and if there is no valid explanation for the deviation, the results are unreliable.

The evidence of Mr. Collo, the plant manager, was that between the first and second tests, and the second and third tests, that he did by using a hammer, bang on the stack so that any adhering dirt or dust would be eliminated from the test. The evidence of Mr. Collo that only about 45 minutes or 1 hour was allowed before resuming the test after banging the stack. This was done between the first and second test, and also between the second and third test. Dr. Smith is of the opinion that there should have been at least three to four hours allowed to elapse after the banging, and before the tests were resumed.

Dr. Smith's opinion was that after the stack banging particules were observed coming out of the stack by Mr. Collo and Mr. Edwards, only large particles could be detected by the naked eye. Further, if these large particles got into the sampling train, it is highly possible that such event could cause the reading to exceed the limits set by the Code. According to the evidence, the sampling process takes in only minute particles generally. It was therefore his opinion it would cast doubt on the results. He was further of the view that if there is to be a deviation from the Code, it should be for a good reason based on absolute necessity or for compelling reasons. Mr. Lanfranco gave no reason based on absolute necessity of why he did depart from the Code, nor did he advance any compelling reasons.

Dr. Smith went on to state "if convenience is the only factor, and if it is the opinion of the sampler whose competence is in question, and I think the Code is like any code of practice for people in the field they're designed by geniuses to be operated by people of less than perfect brilliancy." He went on to state further:

> "There are no possible deviations from the Code unless there is a good reason for it. In that sense, codes are not guidelines. They are regulated procedures which have the force of law. Deviations from them although by competent - based on competent opinions have to be discussed and documented. The purpose of the Code is to set down procedures which no one can argue with and they are required."

Tests of the lead oxide stack were carried out by Chemex Labs (Alberta Ltd.) in October 1980, August 1981 and May 1982. The stacks passed the maximum standards of emission set by the Regulations. Copies of the reports for those years were admitted in evidence, not for the purpose of supporting or not supporting the charge before the court, but because there was considerable criticism of the method employed by the authors of the Beak Report, and therefore, the court could have some appreciation of the criticism of the Beak Report by way of comparison.

Having now had an opportunity of observing the introductory information in the Chemex Report as well as other explanations, the criticism in my view, appears to have some valid foundation. Although it does not necessarily affect the conclusions in the Beak Report, it cannot help but raise some doubt as to whether or not Mr. Lanfranco of Beak Consultants, was fully aware of his obligations to adhere to the Code and methods as prescribed by the Regulations at the time he carried out the tests in question.

In September of 1980, a further test was being arranged to be conducted at the plant. It should be noted that a test at the plant in 1979 was carried out by Beak Consultants with a Mr. Lehland of that firm doing the actual sampling, at which time the tests met all standards. In September of 1980, when a further test was arranged to be conducted, Mr. Collo stated he had a conversation with Mr. Edwards regarding the testing company to be used. At this point in time, Mr. Lehland was no longer in the employ of Beaks. Mr. Collo stated that in this conversation, Mr. Edwards told him there was no one in his opinion at Beaks properly qualified to do the test, or words to that effect. Mr. Edwards does not deny this conversation could have taken place, but has no recollection of it. In that conversation, three other companies were recommended by Mr. Edwards, one of them being Chemex, which carried out the tests referred to above.

I accept Mr. Collo's evidence that this conversation did take place as he stated. There may be no material significance to the conversation except that the inference to be drawn is that Mr. Edwards has some serious reservations about Mr. Lanfranco being involved in any further tests.

Crown Counsel submits in his argument that the Court must accept Mr. Lanfranco's test results unless there is evidence to the contrary, upon which a reasonable doubt can be based. For this argument, he relies on *The Queen v. Oliver*, (1981) 62 C.C.C. (2d) 97, p. 105, a decision of the Supreme Court of Canada. That case dealt with the *Narcotics Control Act* and in particular, a section of the Act wherein if a certificate of an analyst is entered into evidence stating that the subject of the analysis is a drug being dealt in, is prohibited under the *Narcotic Control Act*, a conviction will result unless there is "evidence to the contrary". In other words, Parliament has legislated probative value on the information contained in the certificate.

The distinction, in my view, in the instant case, is that Parliament has through an Order-in-Council, passed a Regulations prohibiting lead emissions over maximum levels into the ambient air, and the onus remains on the Crown throughout to prove a violation of those Regulations. There is no presumption to be relied on as in the *Oliver* case.

Crown Counsel has further urged that evidence of possible inaccuracies resulting from the variances from the Code without evidence as to the effect of the variances in the test results, is not legally sufficient. For this proposition, he relies on *R. v. Crosthwait*, (1980) 52 C.C.C (2d) 129, a decision of the Supreme Court of Canada. With great respect to counsel's forceful argument, in my view, there is a distinction to be drawn between the facts of that case and the facts in the instant case. In the *Crosthwait* case, the court was dealing with a provision of the *Criminal Code*, and in particular, Section 237 where a breath sample taken in accordance with the provisions of that Act, with the results exceeding the prescribed maximum level when such certificate stating so is admitted in evidence, there is a presumption of guilt rebuttable by evidence to the contrary. That is not the situation here where the Crown must adduce evidence which has to satisfy the trier of fact beyond a reasonable doubt. No presumption arises.

The evidence of Mr. Edwards leads to the conclusion that the Code must be adhered to except where in his opinion, or that of his superiors, any variance to the methods of the Code, would not significantly affect the results. That, in my view, leaves much more discretion to the inspector, as Mr. Edwards was in this case, than appears to have been contemplated by the Act or Regulations.

While the Company was obligated by law to retain the testing company, it had no control over the method of testing and was in fact guided by Environment Canada of which to choose from. The Regulations required an inspector to be present during the test, in this case Mr. Edwards, who appears to have exercised some measure of influence or control over the tester.

As stated by Dr. Peters and Dr. Smith, the Code is there to be followed and adhered to unless there are compelling reasons for any departure. No reasons, compelling or otherwise, were given for the departure. Mr. Lanfranco was vague about the non-compliance. Mr. Edwards was of the opinion that the departures would not cause any significant difference in the results. That could be so, but it does leave room for doubt.

I accept the opinion of Dr. Peters and Dr. Smith, two disinterested experts, as to the reliability of the tests and as well, the report by Beaks. The test applied in Canadian jurisprudence with respect to resolving the question of guilt or innocence is:

> "If after a fair and impartial consideration of all of the evidence in the case both for the Crown and the defence, you have an abiding conviction of the guilt of the defendant and are satisfied to a moral certainty of the truth to the charge against him then you are satisfied beyond a reasonable doubt; but if the evidence has left you in that condition of mind that you cannot say you feel an abiding conviction to a moral certainty of the truth of the charge, then you have a reasonable doubt."
>
> (See *R.v. Krafchenko*, 22 C.C.C. p. 278.)

Having considering all of the facts and the applicable law, applying the above quoted test, Canada Metal Company Limited is therefore acquitted.

TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

R. v. CANADIAN MARINE DRILLING LTD.

BOURASSA, Terr. Ct. J. Yellowknife, October 14, 1983

Sentencing - *Fisheries Act*, R.S.C. 1970, c.F-14 as amended - Accused pleads guilty to charge under Section 33(2) - Depositing a deleterious substance into water frequented by fish - Waste oil into Tuktoyaktuk Harbour - $20,000 fine levied.

The accused had stored slops, a waste comprised of oil and water from various sources, in approximately ten barges in Tuktoyaktuk Harbour. On August 30, 1981, one of the barges began to loose her waste cargo. The barge involved had been overloaded at the time, her hull was cracked, seal gaskets were missing, lids were improperly secured and sponsor tank lids were damaged.

The accused immediately made attempts to stop the spillage but was unsuccessful until the morning of September 2, 1981, following the escape of two to three thousand gallons of slops into the harbour.

The accused pled guilty to a charge under section 33(2) of the *Fisheries Act*, RSC 1970, c.F-14 as amended.

The Court held that the accused had given little thought to the disposition of the slops until it had become too big a problem for the defendant to ignore. The sentence must bring home to this defendant and others that there is an obligation upon them to protect the public from the risks of their enterprise including provision for disposition of waste before waste is created. The use of such a vessel in the condition that it was in and the way it was used is, in fact, and in-law, criminal.

The Court considered the attitudinal source of the chain of events that led to the problem, to be continuing. However, the accused's prompt action upon its realization of the crisis was considered a substantial mitigating factor. The accused had prevented what could have been a disastrous spill of oil had the whole 300,000 gallons of waste contained in the barge, escaped into the Tuktoyaktuk Harbour. The Court levied a fine of $20,000.

J. Shipley, for the Crown.
G. Lang, for the Accused.

BOURASSA, Terr. Ct. J.

This matter is for sentencing today. I considered the written submissions of counsel and, of course, the evidence and facts that were introduced at the sentencing hearing.

The defendant is convicted of an offence that;

> "On or about the 2nd day of September, A.D., 1981, at or near the Hamlet of Tuktoyaktuk in the Northwest Territories, did permit the deposit of a deleterious substance, oil, in the water frequented by fish, to wit: Tuktoyaktuk Harbour, contrary to Section 33(2) of the Fisheries Act."

From the evidence that I have heard and the admissions contained in the statement of facts that has been filed, I would make the following synopsis of the facts.

Canadian Marine Drilling Ltd. is a wholly owned subsidiary of Dome Petroleum Limited and was, at all material times, active in oil exploration and the shipment of oil and petroleum products here in the Northwest Territories. Part of its activities included the collecting of wastes, particularly of slops - an oil/water mixture from various sources, such as ship's bilges, holding tanks and the like.

In 1980 or 1981, as a result of a dramatic increase in shipping activity by the defendant, or the defendant's parent company, the defendant was confronted with a very large accumulation of that kind of waste without the means of disposing of it. In the end, the slops were stored in a collection of approximately ten barges moored in Tuktoyaktuk Harbour. There was, at that time, no plan for the disposition of the slops. They were simply stored, and this situation I am given continued for approximately one year.

One of these barges was no. 811, a veteran, as far as I can determine, of at least ten years service. This barge, overloaded by almost one-third, the hull cracked, with damaged sponson tank lids, missing seal gaskets, and improperly secured lids, was not up to gale winds and modest seas in the harbour on August 30, 1981. Her cargo began to escape, and she was in peril of sinking.

Alerted, the defendant reacted quickly, and within thirty minutes, began salvage and damage containment procedures. Barge 811 was towed closer to shore, and containment booms were deployed in an unsuccessful attempt to stop the spillage. Further attempts were made, first to pump Barge 811 out and then to beach it, but slops continued to seep into the harbour, and by the 31st of August, Barge 811's deck was partially awash. More unsuccessful attempts at salvage were made that day.

I use the word "unsuccessful" not as a commentary on the defendant's scope of effort, but it appears to have been a combination of problems with the barge and the weather and all of the circumstances that made those efforts unsuccessful.

Efforts continued on to the 1st and 2nd of September, including the use of divers and more booms. On the 2nd of September, approximately four thousand gallons of slops escaped from Barge 811 into the habour but within the boomed area. This was in addition to the two to three thousand gallons that had escaped on August 30 and 31st and September 1. By the morning of September 2, the defendant was able to stop the leakage and drain Barge 811. Over the following three days, the defendant cleaned up the site as best it could.

It should be noted that there is no evidence before me of environmental damage, but as the courts have held in the past, that is not a critical or significant factor.

Tuktoyaktuk Harbour is a body of water frequented by fish, and it is admitted that the slops contained oils, which are deleterious substances, within the meaning of the Act.

In assessing the penalty for breach of this Act, the Court must consider the source or origin of the chain of events, both in a physical sense and an attitudinal sense because they both combine to create the problem. To find those sources is, in some instances, to illuminate the basic problem and provide a focal point for the Court's efforts at deterrence.

In my view, originating element in an attitudinal sense, is the lack of, or insufficient planning by, the defendant for what I consider obviously forseeable contingencies. The defendant created a problem without concomitantly creating a solution. It appears that little thought was given to the disposition of the slops until it became too large a problem, a high liability legally and financially, for the defendant to ignore. If this defendant or others similarly engaged, for that matter, are going to create waste, it is encumbent upon them to create a waste disposal system. Waste disposal is not the same as waste storage.

SENTENCING

The sentence today must, as much as possible, bring home to this defendant and others that the obligation is upon them to protect the public from the risks of their enterprise, and this must include provision for disposition of waste before waste is created.

The actual chain of events leading to the deposit of deleterious substances does not reflect well on the defendant's attitude and criminality of conduct. The condition of Barge 811 has already been described. The use of such a vessel in the condition that it was in and the way it was used is, in fact, and in law, criminal. This was not an accident, in a pure sense. The potential for spillage of slops into Tuktoyaktuk Harbour was forseeable, and that that potential was made reality by the defendant's conduct and omissions.

I note that the corporation was represented at the sentencing hearing and today by its counsel and by Mr. Vanderkoy the environmental operations supervisor since October of 1981. No corporate executives have appeared.

There has been no evidence of submissions with respect to the size and wealth of the defendant, or that the defendant is unable to pay a maximum fine. As I have already indicated, the defendant is a wholly owned subsidiary of Dome Petroleum Limited.

That raises two interesting side issues. As the evidence has disclosed, the defendant is a wholly owned subsidiary of Dome Petroleum, and I believe the Court must be on guard to see that large corporations do not avoid large fines or responsibility for their illegal actions by establishing a network of small corporations. Had the defendant come to court with empty pockets as it were, an interesting issue arises as to whether or not, upon proper proof of that connection to Dome Petroleum and upon notice to the parent company, the Court can impose a fine on the parent corporation. In addition, the *Fisheries Act* provides for a one hundred thousand dollar fine upon second conviction: The second issue arises as to whether or not a conviction by one wholly owned subsidiary would be a second conviction when dealing with another wholly owned subsidiary or the parent company, itself.

The defendant has solved the physical problem of slop. In mitigation, it has been given to the Court that, as a result of the events of August 30 to September 2, new, improved rules and procedures have been established for handling of slops. Additionally, the defendant has now solved the problem of storage by the use of a Saacke Burner that was made available shortly after these events. The defendant (as a result of actions commenced prior to this occurrence) took delivery of one of the Saacke burners, and now it appears that all of the slops are burned rather than stored, and it would appear, therefore, that the physical source of the danger and the physical source leading up to the events of September 2, has been eliminated. It would appear, therefore, that no further threat exists in that regard but in my view, the Court must consider the attitudinal source as continuing, and that that must be a subject of some consideration with respect to deterrence.

It is submitted that the defendant expended $244,560 as a result of its efforts to contain and then clean up this spill, and it is suggested that the Court ought to consider that expenditure in some mitigation. I am not persuaded that I should do so for two reasons; first, the cost, whatever it is, is as a direct result of the defendant's own conscious acts and omissions -- its crime, and I do not believe any defendant can come to court asking that that expense be taken into mitigation; and secondly, I am not satisfied that the figures represent an accurate breakdown of the actual costs incurred by the defendant.

By way of example, the supply vessel belonging to the defendant, working for the defendant, and immediately available to it, has a cost charge-back to the defendant during the salvage operation. Yet, the costs of that vessel, including the crew, are incurred daily. The labor costs for the defendant's own workers are charged back to the cost of the containment and clean-up attributed to the spill, but I am not satisfied, on the evidence before me, that those costs would not have been incurred in any event, regardless of the spill. I am not satisfied that the cost referred to in the defendant's submissions are costs over and above, or, in excess of its normal operating costs and that they represent a loss to the defendant.

The defendant has pleaded guilty, but the use of that fact in mitigation has to be tempered with the fact that the defendant was inescapably caught. I accept, however, in substantial mitigation, that upon seeing the crisis shortly after it occurred, the defendant acted promptly and with all the resources required to contain the spill and clean-up later. Due to past planning and some forethought, the defendant was able to draw from a substantial inventory of equipment, materials and trained personnel. It has made provision for this kind of emergency in the past, and this forethought prevented what would have been a disastrous spill of oil had the whole three hundred thousand gallons contained in Barge 811 escaped into Tuktoyaktuk Harbour.

Balancing these factors together with the other factors commonly considered in sentencing in environmental situations of cases, the Court must impose an appropriate penalty. The penalty must not only fit the crime and represent a balance of those factors, but it must also fit within the limitations imposed by way of the method of prosecution. Originally, the defendant had been charged with an offence alleging;

> "Between the 31st day of August, 1981 and the 5th day of September, 1981, at or near the Hamlet of Tuktoyaktuk, in the Northwest Territories, did permit the deposit of a deleterious substance, a petroleum product, in water frequented by fish, to wit: Tuktoyaktuk Harbour, contrary to Section 33(2) of the Fisheries Act."

That information was withdrawn prior to plea and replaced by an Information which forms the basis for the sentence today, alleging one count for September 2 only.

The maximum penalty is, therefore, pursuant to Section 33(5); $50,000. Had the Crown proceeded with the original Information and obtained convictions thereunder by virtue of Section 33(6), the maximum penalty would be $300,000. The Court does not question the right of the Crown to choose the method and manner of prosecuting. That is its function, and it is not the function of the Court. The choice, however, does affect the Court's scope or range in assessing penalty.

While the Court may view this offence or the offence before it as serious and requiring a significant penalty — by significant, I mean significant to the defendant -- it must scale the penalty within the range dictated by the Crown's prosecution, even if the end result is perceived to be an inadequate response.

The Crown, in exercising its right to control prosecutions, has elected to prosecute the defendant for one day, one offence, on September 2. I mention this because in its submissions, the Crown invited the Court to penalize the defendant as if it were dealing with six counts. In effect, scaling the penalty against the maximum for six convictions, and that position is untenable.

The situation here is analogous to the Ontario Court of Appeal decision in *R.* v. *Sanatkar*, 64 C.C.C., 2nd, p. 325, where Lacourciene, JA states at p. 327 in dealing with the impact of the Crown's election on a hybrid offence;

> "The gravity of the offence reflected by the maximum penalty provided for under the relevant paragraph is not only a relevant factor but is quite properly considered to be the most important factor in determining the fitness of the sentence ......"

The Crown's election, as it were, represents a prosecutorial choice of proceedure reflecting the prosecutor's view of the seriousness of the offence.

I point out, at this juncture, that the defendant was spending sixty to ninety thousand dollars ($60,000 - $90,000 per month per barge for slop storage. I am told there were, at one point in time, ten barges used for slop storage for one year. This amounts to in excess of seven million dollars ($7,000,000) for the ten barges moored in Tuktoyaktuk Harbour. Whether the barges were moored there for one year or a lesser period is unclear from the evidence. In any event, I am prepared to conclude that the defendant was willing to spend, and able to spend, millions of dollars for the temporary storage of slops.

This court must express its grave reservations with respect to the significance and deterrent effect of a fine scaled to a maximum of $50,000 on a defendant willing and able to spend these kinds of sums for slop storage.

Notwithstanding the above, however, a virtually unuse and potentially far reaching and effective sentencing tool remains in the Court's hands, and that is Section 33(7). This subsection represents an amendment from previous formulations that allowed for ex post facto orders only, and it is a section that is found in most environmental legislation.

> "where a person is convicted of an offence under this section, the court may, in addition to any punishment it may impose, order that person to refrain from committing any further such offence or to cease to carry on any activity specified in the order the carrying on of which, in the opinion of the court, will or is likely to result in the committing of any further such offence or ...."

and I emphasize,

> " .... to take such action specified in the order as, in the opinion of the Court, will or is likely to prevent the commission of any further such offences."

It is clear to me, that through this section, a convicting Court may intervene in the internal and external operations of a corporation. In fact, it may be able to pierce the corporate veil in a significant way, "if, in the opinion of the Court, its actions will or are likely to prevent the commission of any further offence."

In proper circumstances, this section may, perhaps, be used for orders such as restitution, compensation, affirmative action, clean-up or even an order to a defendant to restock a body of water with fish; all, of course, provided that the order is or will likely prevent further offence by the defendant. It would appear to me that such an order making a defendant liable financially for damage wrought as a result of its activities could have a significant and positive effect as a deterrent.

The section has not been employed in any reported case that I have been able to find, but that will not prevent its use in the future. In my view, had the defendant not already provided for the Saacke Burner and completely eliminated the storage of slops in Tuktoyaktuk Harbour, it would be open for this court to so order.

I mention subsection 7 as a caution to this defendant that, in the future, there may be repercussions for illegal conduct which, as I have already indicated, go far beyond fines in their effectiveness. This court will not hesitate to use this tool in future cases with any defendant where the circumstances warrant.

Balancing then these diverse factors and for these reasons, I am going to impose a fine, and with respect, I would repeat and adopt the words of Mr. Justice de Weerdt in the *R. v. Placer Development Ltd.*, (1983), 12 CLER 58, NWT SC, that although the fine may be substantial for an individual, it is insignificant or virtually insignificant to this defendant and that, perhaps, and hopefully, "the real penalty is that the defendant has now a conviction against it", and that, I would add, the denunciation in public, as a result of this conviction, may act as a deterrent and encourage the defendant to plan for contingencies such as this in the future.

There will be a fine of $20,000. In default, distress.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. CAROLIN MINES LTD.

ANDERSON, Prov. Ct. J. Langley, March 30, 1984

***Fisheries Act*, R.S.C. 1970, c.F-14 as amended - Accused charged with 14 counts under section 33(2) - Depositing a deleterious substance into water frequented by fish - Mine effluent into Elman Creek leading to Coquihalla River - Toxicity due to high level of cyanide.**

Sentencing - Discharging on a continuing basis - Accused found guilty on 9 out of 14 counts.

The accused was charged with 14 counts under section 33(2) of the *Fisheries Act*, R.S.C. 1970 c.F-14 as amended. The Court found on the facts that during March and April of 1982 large quantities of chemical waste were discharged directly into Elman Creek which leads into the Coquihalla River.

Samples of dead fish were examined by fishery experts on the river and in laboratories and test results indicated signs of cyanide effects. Other tests included the placing of healthy fish in traps in 3 separate places along the river during the period when the accused was in operation. The fish in the trap closest to the mill died and in the downstream traps the fish were either dead or stressed.

Analyses of water samples indicated that discharge from the mill was highly toxic and that samples taken downstream became less toxic with the distance travelled.

Held, the accused was found guilty on 9 counts.

The Court accepted the test results indicating high toxicity and the Crown's expert testimony on the effects of cyanide on fish, concluding that the discharge from the mill was highly deleterious to fish and was still in a deleterious state for a considerable distance in the river system.

The Court found the accused had discharged on a continuing basis starting on March 31, 1982 and concluding on April 8, 1982, when the mill shut down. The Court relied on evidence of conversations between Fishery Officers and the General Manager and Mill Superintendent of the accused, on April 7, 1982 wherein it was stated that the mine had been discharging into the Creek for "the past 7 to 14 days." His Honour Anderson J. accepted the lower of these figures, and on this basis, counts 1 to 5 inclusive were dismissed.

John D. Cliffe, for the Crown.
John E. Hall, Q.C. for the Accused.

ANDERSON, Prov. Ct. J.

The accused, Carolin Mines Ltd., is charged in a fourteen (14) count Information, that between March 26, 1982 and April 8, 1982:

> "...near Hope, British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance, mine effluent, in a place under conditions where such deleterious substance entered into water frequented by fish, Ladner Creek and Coquihalla River, in violation of Section 33(2) of the *Fisheries Act*."

> Section 33(2) reads as follows:
>
> > "Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water."
> > (SS. 4 does not apply)
>
> Section 33(6) reads as follows:
>
> > "Where an offence under subsection (5) is committed on more than one day or is continued for more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued."
>
> Section 33(8) reads as follows:
>
> > "In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission."
>
> Section 33(11)(a) reads as follows:
>
> > "deleterious substance" means
> >
> > a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by may of fish that frequent that water."

The trial commenced on June 27, 1983 and the evidence concluded on December 16, 1983 after 12 days of evidence, of which about 10 days was taken up by expert opinion evidence.

There were certain undisputed matters in the evidence as follows: (some of these admitted and others in which the defence offered no evidence to rebut)

> On April 6, 1982, in the afternoon, a citizen noted a number of dead and dying fish in the Coquihalla River and reported same to the Fisheries Officer in Hope.

Shortly after, before dusk, on the same date, two Fisheries Officers went to the same area - noted dead fish - and took water samples as follows:

(a) a point know as 16 KM.
(this is the sample taken the most distant downstream from the confluence of Ladner Creek and the Coquihalla River)

(b) a point 100 ft. north of the confluence of Coquihalla River and Ladner Creek - (sample from Coquihalla River)

(c) 1/4 mile below the Carolin Mines Mill (sample from Ladner Creek - west fork - also known as Elman Creek and hereafter will be referred to as Elman Creek)

The following day, April 7, 1982, at about noon, the Fisheries Officers visited the Carolin Mines and met Mr. Collins, the General Manager, and obtained 3 samples of the mill discharge.

Early on April 8, 1982, these various samples were taken to laboratories for analyses and bioassays.

Later on that day 3 more samples of the mill discharge were obtained, and also a sample of the water of Elman Creek was obtained from a point above the mill discharge.

On April 9th, these samples were taken to the laboratories for tests.

On April 8, 1982, in the afternoon, this mill operation was shut down.

The mill is situated beside Elman Creek which eventually joins the Coquihalla River about 2-1/2 miles downstream. There are no fish in Elman Creek at the mill site because there is a 30 foot waterfall about one mile downstream from the mill.

During a period of time in March and April (I will deal with this more specifically later) the mill was discharging large quantities of chemical waste directly into Elman Creek and there is no denial that it was a substance deleterious to fish and that in the normal course of events would become mixed with the water below the waterfall and the Coquihalla River - although some changes in content and dilution would take place.

Samples of dead fish were examined by fisheries experts on the spot (Coquihalla River) and at a fisheries laboratory. These tests, etc., indicated strong signs of cyanide effects on the dead fish and no other reason for death could be found biologically.

During the period of the discharge about 14,000 steelhead smolts were released at various points on the Coquihalla River and it was mostly these fish that were found dead, although a few adult fish were found dead.

On April 7th, 5 or 6 healthy steelhead smolts were placed in each of 3 G-traps and placed in 3 places in the waters of the Coquihalla River. The following day the traps were checked and the fish in the traps closest to the Ladner confluence were all dead and the ones further downstream showed some dead and the rest suffering stress.

On April 20th (12 days after the mill stopped discharging into Elman Creek) similar tests were carried out at the same above locations. When the fish were checked on April 21st there was no indication of any change from their normal healthy condition of the day before.

The analyses of the water samples indicate that the discharge from the mill was highly toxic and that the samples taken downstream became less toxic with the distance travelled. The sample taken from Elman Creek above the mill contained no toxic material, nor did the sample taken from the Coquihalla River above the confluence of Ladner Creek.

The defense argues that any discharge from the mill would be so diluted by the time it reached a point of fish habitat that it would not affect the fish. This is only speculative and no evidence was offered to show that any tests were taken to establish this fact.

There is ample evidence to show that fish were inhabiting the waters of Elman Creek, Ladner Creek and Coquihalla River below the waterfall on Elman Creek and I find that this is a fact.

The defence also argues that the fish may have died from reasons other than the mill discharge but this of course would be speculative and does not raise a reasonable doubt as to the cause of death being anything but cyanide and possibly other toxic substances from the mill.

The defence offers evidence to the effect that the type of G-traps used in the river were unsuitable for that purpose, because of several reasons, such as the zinc galvanized coating and the possibility of sharp edges on the metal. The evidence does not support this theory.

Much was made about the method of bioassays done in the Fisheries laboratory. This was a test where fish were put in a tank with normal water and compared to ones placed in a sample taken from the mill discharge. Even if I did not accept these as conclusive tests, there is no question that the mill discharge was extremely toxic to fish.

The crucial matter to be decided is whether or not the mill discharge entered the fish habitat in sufficient quantities to affect fish.

When I consider all of the above, the water samples and analyses, the tests taken with the G-traps on April 7th and again on April 20th and the results thereof, the evidence of Dr. Leduc (whom I consider the most knowledgeable expert in the field of the effects of cyanide on fish), and the visual observations and inspection of the dead fish by the biologists, I can come to no other conclusion than the discharge from the mill was highly deleterious to fish and was still in a deleterious state for a considerable distance in the river system inhabited by fish.

As a result the accused must be found guilty. I will now deal with the number of counts to which this decision applies.

There is ample direct evidence from the investigation that it applies to Counts 12, 13 and 14, i.,e. April 6th, 7th and 8th, 1982.

As to the other counts, previous to April 6th we have the evidence of conversations admitted into evidence. These conversations on April 7, 1982 were with two Fisheries Officers and the General Manager and the Mill Superintendent. The latter two men advised the Fisheries Officers that the mine had been discharging this effluent into Elman Creek for the past 7 to 14 days. I accept this as a fact but will give the accused the benefit of the doubt and accept the lower of the two figures, i.e. 7 days prior to April 7th. I find the discharge was on a continuing basis starting on March 31, 1982 and concluded on April 8, 1982, when the mill shut down. The net result is that Counts 1 to 5 inclusive will be dismissed and the accused adjudicated guilty on Counts 6 to 14 inclusive (that is 9 counts).

COUNTY COURT OF WESTMINSTER

R. v. CAROLIN MINES LTD.

DROST, Co. Ct. J. New Westminster, October 10, 1985

Fisheries Act, R.S.C. 1970, c.F-14 as amended - Appeal from conviction on nine counts under Section 33(2) - Depositing a deleterious substance into water frequented by fish - Mine effluent - Coquihalla River - Toxicity due to high level of recoverable cyanide, not to high pH level - Appeal allowed as to six of nine counts.

The accused had been found guilty on nine counts of discharging mine effluent from its mill contrary to S.33(2) of the Fisheries Act, R.S.C. 1970, c.F-14 as amended. The Appellant did not dispute that the effluent discharged at the mill site was toxic to fish at the point of discharge, but submitted that toxicity was the result of high alkalinity, rather than the high recoverable or total cyanide content of the effluent. It also argued that the bioassay tests were misleading or valueless because of the high pH levels in the test samples. The Appellant further argued that it was not "such deleterious substance" as worded in the section but rather another deleterious substance that resulted by reason of photolysis and dilution, and that entered the water frequented by fish.

Held, Appeal allowed as to six of nine counts.

The trial judge found that the mill discharge was "extremely toxic" and "highly deleterious to fish ... and still in a deleterious state for a considerable distance in the river system inhabited by fish", relying not only on the bioassay tests, but also on the water samples and analyses, the G-trap tests, the evidence of a witness considered by the trial judge "the most knowledgeable expert in the field on the effects of cyanide on fish", and the visual observations and inspection of dead fish by biologists who testified at the trial. All of these factors established beyond a reasonable doubt that the toxicity of the effluent was referrable to the high level of recoverable cyanide contained therein, not to its high pH level, and that the effluent was a deleterious substance which extend the fish habitat.

Further, the Court held that the deleterious substance specified in the Indictment was "mine effluent", not cyanide, iron cyanide complex or copper cyanide complex. The eventual and forseeable release of cyanide from the two complexes did not alter in any way the fact that they formed part of the mine effluent. The evidence also clearly established that the mine effluent, containing the quantities of iron cyanide complex and copper cyanide complex was a "substance that, if added to water, would degrade or alter or form part of a process (i.e. photolysis and dilution) of degradation or alteration of the quality of that water so that it is rendered deleterious to fish," within the meaning of "deleterious substance" as defined by S.33(11). However, for six of the nine days there was no evidence in the form of bioassays, water samples, G-trap tests or observations of dead and dying fish, but only conversations between Fisheries Officers and the appellant's general manager and mill superintendent. This evidence was found by the appeal court to be of too obvious and uncertain a character to support the convictions on those charges. Accordingly, the appeal was allowed as to six of the counts.

Digby R. Kier, Q.C. and **John D. Cliffe**, for the Crown (Respondent).
John E. Hall, Q.C. and **K.W. Ball**, for the Accused (Appellant).

DROST, Prov. Ct. J.

The Appellant appeals from convictions registered against it on March 30, 1984 on nine counts that between March 31, 1982 and April 8, 1982, near Hope, British Columbia, it did unlawfully deposit or permit the deposit of a deleterious substance, mine effluent, in a place under conditions where such a deleterious substance entered into water frequented by fish, Ladner Creek and Coquihalla River, in violation of s. 33(2) of the Fisheries Act.

The accused was charged in a 14 count Information alleging violations of s. 33(2) of the Fisheries Act over the period March 26, 1982 to April 8, 1982 inclusive. The trial of this matter occupied twelve days and written submissions were filed by both parties. The learned trial judge convicted the Appellant on 9 of the 14 counts and sentenced the accused to pay a fine of $15,000.00 per count, making a total fine of $135,000.00.

The Appellant, Carolin Mines Ltd., owns and operated a gold mine property located approximately 15 miles north east of British Columbia. The Appellant's mine, fixtures and buildings are located on both sides of the west fork of Ladner Creek (also known as Elman Creek) which flows into Ladner Creek, which in turn empties into the Coquihalla River.

THE RELEVANT PROVISIONS OF THE "FISHERIES ACT"

S.33(2) of the Fisheries Act:

> "No person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter such water."

S.33(11) of the Act defines "deleterious substance", for the purposes of s. 33 of the Act, to mean:

> "(a) Any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or
>
> (b) Any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water."

S. 33(11) of the Fisheries Act also defines "deposit" for the purposes of s. 33 of the Act to mean:

> "Any discharging, spraying, releasing, spilling, leaking, seeping, pouring, committing, emptying, throwing, dumping or placing."

THE JUDGMENT

On March 30, 1984 the learned trial judge handed down written Reasons for Judgment which, omitting the introductory portion, read as follows:

> " There were certain undisputed matters in the evidence as follows: (some of these admitted and others in which the defence offered no evidence to rebut)
>
> On April 6, 1982, in the afternoon, a citizen noted a number of dead and dying fish in the Coquihalla River and reported same to the Fisheries Officer in Hope.
>
> Shortly after, before dusk, on the same date, two Fisheries Officers went to the same area - noted dead fish - and took water samples as follows:
>
> (a) a point known as 16 KM.
> (this is the sample taken the most distant downstream from the confluence of Ladner Creek and the Coquihalla River)
>
> (b) a point 100 ft. north of the confluence of Coquihalla River and Ladner Creek - (sample from Coquihalla River)
>
> (c) 1/4 mile below the Carolin Mines Mill (sample from Ladner Creek - west fork - also known as Elman Creek and hereafter will be referred to as Elman Creek)
>
> The following day, April 7, 1982, at about noon, the Fisheries Officers visited the Carolin Mines and met Mr. Collins, the General Manager, and obtained 3 samples of the mill discharge.
>
> Early on April 8, 1982, these various samples were taken to laboratories for analyses and bio-assays.
>
> Later on that day 3 more samples of the mill discharge were obtained, and also a sample of the water of Elman Creek was obtained from a point above the mill discharge.
>
> On April 9th, these samples were taken to the laboratories for tests.
>
> On April 8, 1982, in the afternoon, this mill operations was shut down.

The mill is situated beside Elman Creek which eventually joins the Coquihalla River about 2 1/2 miles downstream. There are no fish in Elman Creek at the mill site because there is a 30 foot waterfall about one mile downstream from the mill.

During a period of time in March and April (I will deal with this more specifically later) the mill was discharging large quantities of chemical waste directly into Elman Creek and there is no denial that it was a substance deleterious to fish and that in the normal course of events would become mixed with the water below the waterfall and the Coquihalla River - although some changes in content and dilution would take place.

Samples of dead fish were examined by fisheries experts on the spot (Coquihalla River) and at a fisheries laboratory. These tests, etc., indicated strong signs of cyanide effects on the dead fish and no other reason for death could be found biologically.

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The defense argues that any discharge from the mill would be so diluted by the time it reached a point of fish habitat that it would not affect the fish. This is only speculative and no evidence was offered to show that any tests were taken to establish this fact.

There is ample evidence to show that fish were inhabiting the waters of Elman Creek, Ladner Creek and Coquihalla River below the waterfall on Elman Creek and I find that this is a fact.

The defense also argues that the fish may have died from reasons other than the mill discharge but this of course would be speculative and does not raise a reasonable doubt as to the cause of death being anything but cyanide and possibly other toxic substances from the mill.

The defense offers evidence to the effect that the type of G-traps used in the river were unsuitable for that purpose, because of several reasons, such as the zinc galvanized coating and the possibility of sharp edges on the metal. The evidence does not support this theory.

Much was made about the method of bioassays done in the Fisheries laboratory. This was a test where fish were put in a tank with normal water and compared to ones placed in a sample taken from the mill discharge. Even if I did not accept these as conclusive tests, there is no question that the mill discharge was extremely toxic to fish.

The crucial matter to be decided is whether or not the mill discharge entered the fish habitat in sufficient quantities to affect fish.

When I consider all of the above, the water samples and analyses, the tests taken with the G-traps on April 7th and again on April 20th and the results thereof, the evidence of Dr. Leduc (whom I consider the most knowledgeable expert in the field of the effects of cyanide on fish), and the visual observations and inspection of the dead fish by the biologists, I can come to no other conclusion than the discharge from the mill was highly deleterious to fish and was still in a deleterious state for a considerable distance in the river system inhabited by fish.

As a result the accused must be found guilty. I will now deal with the number of counts to which this decision applies.

There is ample direct evidence from the investigation that it applies to Counts 12, 13 and 14, i.e. April 6th, 7th and 8th, 1982.

As to the other counts, previous to April 6th we have the evidence of conversations admitted into evidence. These conversations on April 7, 1982 were with two Fisheries Officers and the General Manager and the Mill Superintendent. The latter two men advised the Fisheries Officers that the mine had been discharging this effluent into Elman Creek for the past 7 to 14 days. I accept this as a fact but will give the accused the benefit of the doubt and accept the lower of the two figures, i.e. 7 days prior to April 7th. I find the discharge was on a continuing basis starting on March 31, 1982 and concluded on April 8, 1982, when the mill shut down. The net result is that Counts 1 to 5 inclusive will be dismissed and the accused adjudicated guilty on Counts 6 to 14 inclusive (that is 9 counts)."

THE GROUNDS OF APPEAL

The Appellant submits that:

1. The learned trial judge failed to properly appreciate the argument of the Appellant on the question of effluent toxicity.
2. The learned trial judge gave undue weight to bioassay tests that were misleading or valueless because of the high pH levels in the test samples.
3. The learned trial judge failed to appreciate the significance of the word "such" in the wording of the charges against the Appellant.
4. The learned trial judge erred in relation to 6 of the counts (March 31, 1982 - April 5, 1982) on which convictions were registered by finding that any deleterious substance was released prior to April 6 fo 1982 when no basis for such conclusion was founded on the evidence.

Grounds 1, 2 and 3 are applicable to all 9 counts on which convictions were entered. Ground 4 relates to counts 6 to 11 and does not apply to counts 2, 13 and 14.

With respect to Grounds 1 and 2, which were argued together, the Appellant does not dispute that the effluent discharged at the mill site was toxic to fish, at the point of discharge. However, it is submitted that the toxicity is a result of the high alkalinity, rather than the high recoverable or total cyanide content of the effluent.

On April 7, 1982 and April 8, 1982 samples were taken from the mill's effluent discharge flume. These samples were later tested and it was found that the samples taken April 7, 1982 contained 21 milligrams per litre of recoverable or total cyanide and had a pH level of 10.2. The samples taken April 8, 1982 contained 22 milligrams per litre of total cyanide and had a pH level of 10.5.

The bioassay tests referred to in the Appellant's second ground of appeal were those mentioned by the trial judge in that paragraph of his reasons for judgment which reads as follows:

> "Much was made about the method of bioassays done in the Fisheries laboratory. This was a test where fish were put in a tank with normal water and compared to ones placed in a sample taken from the mill discharge. Even if I did not accept these as conclusive tests, there is no question that the mill discharge was extremely toxic to fish."

The bioassay tests showed that all of the fish died between 5 and 10 minutes after being placed in the sample of effluent taken April 7, 1982, and that all of the fish died between 40 minutes and 80 minutes after being placed in the sample taken April 8, 1982.

Further evidence showed that the pH level of the effluent being discharged by the mill dropped to 8.5 a few hundred yards downstream, well before entering the fish habitat.

Mr. Monteith, a biologist who gave expert evidence for the Appellant, testified that the pH levels of the effluent used in the bioassay tests were themselves "lethal" and that he would expect fish put into solutions having such pH levels to die within an hour. However, he was unable to explain why the fish placed in the sample taken April 8, 1982, containing the higher pH level, lived significantly longer than those placed in the sample taken April 7, 1982, which had a lower pH level.

Dr. Leduc who gave evidence for the Crown and who the trial judge considered"... the most knowledgeable expert in the field of the effects of cyanide on fish..." described the two mine effluent samples as "highly deleterious" and "lethally toxic to fish" because of the high concentration of total cyanide. He testified that he would expect fish exposed to such high cyanide levels to die within a few minutes. He described the longer survival time of the fish placed in the sample taken April 8, 1982, to the higher pH level of that sample. He and others explained that the pH level, which has a range between 1 and 14, is a measurement of acidity versus alkalinity. A solution is neutral if it has a pH level of 7. The higher the pH level, the more alkaline the solution. The lower the level, the more acidic it is. Dr. Leduc described the longer survival time of the fish placed in the sample taken April 8, 1982 to the higher pH level of that sample which would restrict or mask the toxicity of its cyanide content.

The Appellant submits that the trial judge did not clearly indicate, in his reasons for judgment, whether he considered the results of the bioassay tests reliable, nor did he resolve the question as to why the discharge samples were toxic.

In my opinion this submission is unsound. When, after referring to the bioassay tests, the trial judge wrote"... Even if I did not accept these as conclusive tests ..." he was, in my view, stating that he did accept the tests as conclusive evidence. It is also clear, in my view, that in finding that the mill discharge was "...extremely toxic ..." and "...highly deleterious to fish ... and still in a deleterious state for a considerable distance in the river system inhabited by fish ..." the learned trial judge relied, not only on the bioassay tests, but also on the water samples and analyses, the G-trap tests, the evidence of Dr. Leduc and the visual observations and inspection of dead fish by biologists who testified at the trial. All of these factors, on my reading of the evidence, establish beyond reasonable doubt that the toxicity of the effluent discharged from the mill was referrable to the high level of recoverable cyanide contained therein, not to its high pH level and that the effluent was a deleterious substance which entered the fish habitat.

Accordingly, I find that the first two grounds of appeal must fail.

The third ground has to do with the wording of the charge contained in the Indictment.

At the outset of the trial the Indictment was amended, by adding, after the words "... mine effluent...", where they appeared in each count, the words "... in a place under conditions where such deleterious substance entered ...", so that each count in the Indictment then read, after alleging a date and the place:

> "... did unlawfully deposit or permit the deposit of a deleterious substance, mine effluent, in a place under conditions were such deleterious substance entered into water frequented by fish ...".
> (my underlining)

The reason for the amendment was that the Crown, after preferring the Indictment, discovered that the place where the effluent entered the west fork of Ladner Creek was, because of a waterfall a short distance downstream, not a fish habitat. However, as noted above, the west fork of Ladner Creek flowed into Ladner Creek proper, which in turn emptied into the Coquihalla River, an acknowledged fish habitat.

The British Columbia Court of Appeal in *Regina v. MacMillan Bloedel (Alberni) Ltd.* (1979) 47 C.C.C. (2d) 118 considered the effect and meaning of sections 33(2) and 33(11) of the *Fisheries Act*, set forth above. In that case the Court decided that:

(a) S. 33(2) prohibits the deposit of a deleterious substance, not the deposit of a substance that causes the water to become deleterious and

(b) that what is defined in s. 33(11) is the substance that is added to the water rather than the water after the addition of the substance.

At p. 120 Seaton J.A. dealing with the interpretation of s. 33(11) said:

> "Once it is determined that Bunker C oil is a deleterious substance and that it has been deposited the offence is complete without ascertaining whether the water itself was thereby rendered deleterious. I do not think that the words "that water" in the definition section mean the water to which it is alleged the accused deposited the substance. Those words refer back to "any water", at the beginning of the definition; the hypothetical water which would degrade if the oil was added to it."

At p. 121, Seaton J.A. went on to say:

> "Had it been the intention of Parliament to prohibit the deposit of a substance in water so as to render that water deleterious to fish, that would have been easy to express. A different prohibition was decided upon. It is more strict. It seems to exclude each part of the process of degradation. The thrust of the

> section is to prohibit certain things, called deleterious substances, being put in the water. That is the plain meaning of the words used and is the meaning that I feel bound to apply."

The British Columbia Court of Appeal in *Her Majesty the Queen v. Western Stevedoring Company Ltd.* (unreported) CA 821509, January 18, 1984, determined that the effect of s. 33(2) of the *Fisheries Act* is that there are two modes of committing the offence. The first is by the actual deposit of the deleterious substance in the water. The second is the deposit of it in a place under conditions where it may enter water inhabited by fish.

It is to be noted that in his reasons for judgment the learned trial judge said, after reviewing the evidence:

> "I can come to no other conclusion that the discharge from the mill was highly deleterious to fish and was still in a deleterious state for a considerable distance in the river system inhabited by fish."
> (my underlining)

This clearly indicates to me that the trial judge had in his mind the "second mode" of committing the offence.

The Appellant points out that the Crown could have, but did not, when amending the Indictment, go on to add the further words of s. 33(2): "... or any other deleterious substance that results from the deposit of such deleterious substance ...".

The deleterious substance referred to in the Indictment is "mine effluent" which the learned trial judge found as a fact on evidence which, as set forth above, I consider quite sufficient, was a deleterious substance.

The Appellant, under this ground of appeal, does not dispute that the substance which was discharged into the west fork of Ladner Creek was a deleterious substance, but argues that it was not such deleterious substance that subsequently entered the water inhabited by fish.

The Appellant, in its mining operation, employed a process of cyanide leaching, whereby particles of gold are extracted from crushed ore. During this process some of the cyanide becomes bonded to particles of iron and copper forming, respectively, particles of iron cyanide complex and copper cyanide complex.

The evidence led by the Crown at trial showed that:

1. The total cyanide content of the mine effluent consisted of:

   (a) free cyanide;
   (b) cyanide in the form of iron cyanide complex;
   (c) cyanide in the form of copper cyanide complex.

2. That iron cyanide complex when exposed to the ultra violet radiation in sunlight, through a process of reaction known as photolysis, releases the cyanide into the water so that the cyanide portion of the complex then becomes free cyanide.

3. That copper cyanide complex will, through the process of dilution in water, release the cyanide portion of the complex, which cyanide will then also become free cyanide.

4. That free cyanide, when combined with the hydrogen ions in water, forms hydrogen cyanide (HCN), which is a prime toxic agent.

5. That dead and dying fish observed at several points in the fish habitat below the mill discharge as well as those fish which were the subject of G-trap tests performed on April 7, 1982, displayed classic signs of the known effect of cyanide on the respiratory systems of those fish.

6. That the process of photolysis reaction on the iron cyanide complex and the dilution reaction on copper cyanide complex are well established.

The Crown submits that the photolysis and dilution effects are encompassed within the words "any conditions" contained in s. 33(2) of the *Fisheries Act.*

The Appellant referred to and relied heavily upon the decision of the British Columbia Court of Appeal in *Regina v. Celebrity Enterprises Ltd. et al.* 1978 2 W.W.R 562. In that case the accused were charged jointly on two counts. Robertson J.A., with whom the other members of the Court agreed, after reviewing the evidence and the provisions of the Criminal Code on which the charges were based stated, at p. 567:

> "With respect, I think that in assessing the legal significance of the Acts alleged to have been proved the learned judge lost sight of the offence which count 1 charged the accused with having conspired to commit...".

And at p. 568, went on to say:

> "It appears clear, therefore, that the appellants were found guilty of an offence with which they were not charged, and conversely that the appellants were found not guilty of the offence with which they were charged."

Here, the Appellant argues that the evidence led by the Crown and relied upon by the learned trial Judge establishes that it was not such deleterious substance deposited by the Appellant which entered into water frequented by fish but rather another deleterious substance that resulted, by reason of the processes of photolysis and dilution, that entered the water frequented by fish.

I find this argument unsound for two reasons:

1. Firstly, the deleterious substance specified in the Indictment was not cyanide, iron cyanide complex or copper cyanide complex, but "mine effluent". The evidence clearly establishes that the mine effluent did contain a high level of total cyanide consisting, as I have said, of free cyanide and cyanide in the form of iron cyanide complex and copper cyanide complex. Under the conditions existing where the effluent was discharged, namely, running water exposed to sunlight, the cyanide portions of the iron cyanide complex and copper cyanide complex would be expected to and did become free cyanide. The iron cyanide complex and copper cyanide complex contents of the mine effluent were part of the total cyanide content which, in the opinion of

Dr. Leduc, whose evidence the learned trial judge accepted, caused the mine effluent to be a deleterious substance. The eventual and foreseeable release of cyanide from the two complexes does not, in my opinion, alter in any way the fact that they formed part of the mine effluent;

2. In my view, the evidence also clearly established that the mine effluent, containing the quantities of iron cyanide complex and copper cyanide complex was a "... substance that, if added to any water, would degrade or alter or form part of a process (i.e. - photolysis and dilution) of degradation or alteration of the quality of that water so that it is rendered deleterious to fish ...", within the meaning of "deleterious substance" as defined by s. 33(11).

In other words, given the known reaction of iron cyanide complex to the effect of photolysis and of copper cyanide complex to the effect of dilution, the mine effluent containing such material when deposited in water in a place under conditions where such reactions would occur and where the water containing such effluent will enter water frequented by fish was and remained a deleterious substance.

Accordingly, I find against the Appellant on this ground of appeal.

The Appellant's argument with respect to the fourth ground of appeal, namely, that the learned trial judge erred in relation to six of the counts (March 31, 1982 through April 5, 1982) on which convictions were registered, proceeded on the assumption that the convictions with respect ot the counts relating to April 6, 7 and 8, 1982, were correctly entered.

The point taken is that there was no evidence that a deleterious substance was discharged by the Appellant during the period March 28, 1982 through April 5, 1982, or alternatively, that there was insufficient evidence on which to found a conviction.

As noted above, evidence led by the Crown established that:

(a) On April 6, 1982, dead and dying fish were observed and these showed classic symptoms of the effect of cyanide on their respiratory systems;

(b) the samples of effluent taken from the mill's discharge flume on April 7 and April 8, 1982, were, as a result of their high total cyanide levels, a deleterious substance.

In the final paragraph of his reasons for judgement, the learned trial judge refers to the evidence on which he based the convictions entered with respect to the 6 days prior to April 6, 1982, that is the period March 31, 1982 to April 5, 1982, inclusive. This evidence consisted of conservations, admitted into evidence, between Fisheries Officers and the Appellant's General manager and Mill Superintendent. It is clear that with respect to these dates there was no evidence in the form of bioassays, water samples, G-trap tests or observations of dead and dying fish, all of which comprised the body of evidence on which the convictions with respect to April 6, 7 and 8, 1982, were founded.

The Crown submits that the evidence as to the conversations which was accepted by the learned trial judge, to the effect that the Appellant had been discharging its mine effluent into the creek for 7-14 days, is sufficient foundation for the convictions.

(Editor: The Court then cited the testimony of Mr. Pastuch, one of the Fisheries Officers concerning the conversations on April 7th and 9th 1982, referred to by the learned trial judge.)

The duties of an appellate court are defined in the well known case of *Corbett v. The Queen* (1973) 14 C.C.C. (2d) 385 and *Harper v. The Queen* (1982) 65 C.C.C. (2d) 193. Mr. Justice Pigeon, delivering the judgment of the majority in *Corbett v. The Queen* summed up the court's role in these words:

> "The *Criminal Code* expressly provides that the appeal may be allowed, not only when the verdict cannot be supported by the evidence but also when it is unreasonable. In other words, the Court of Appeal must satisfy itself not only that there was evidence requiring the case to be submitted to the jury, but also that the weight of such evidence is not so weak that a verdict of guilty is unreasonable. This cannot be taken to mean that the Court of Appeal is to substitute its opinion for that of the jury. The word of the enactment is 'unreasonable', not 'unjustified'. The jurors are the triers of the facts and their finding is not to be set aside because the Judges in appeal do not think they would have made the same finding if sitting as jurors. This is only to be done if they come to the conclusion that the verdict is such that no 12 reasonable men could possibly have reached it acting judicially."

Mr. Justice Estey in *Harper v. The Queen* said:

> "An appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. The duty of the appellate tribunal does, however, include a review of the record below in order to determine whether the trial Court has properly directed itself to all the evidence bearing on the relevant issues. Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede."

As I mentioned earlier there is no evidence with respect to the charges covering the six day period, March 31, 1982 to April 5, 1982, inclusive, other than the conversations, with the possible exception of the fact that fish placed in G-traps and set in the river on April 20, 1982, showed no ill effects. The Crown urges that this additional piece of evidence should be taken into account, but to my mind it goes only to prove that after the mill stopped discharging, on April 8, 1982, the situation cleared up. It does not prove that the Appellant was discharging a deleterious substance between March 31, 1982, and April 5, 1982.

In addition to the lack of bioassays, water samples, etc., there was no evidence as to when the Appellant's chlorination system broke down.

With respect to the learned trial judge, I have come to the conclusion that the evidence put forward by the Crown in support of the charges covering the period March 31, 1982, to April 5, 1982, inclusive, at the most raises a suspicion, but is of too dubious and uncertain a character to support the convictions on those charges. Therefore, it is my view that the convictions on those charges were unreasonable and should be set aside.

Accordingly, the appeal as to counts 6-11 inclusive, is allowed.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. CENTRAL FRASER VALLEY REGIONAL DISTRICT

MacALPINE PROV. CT. J. Clearbrook, June 26, 1987

***Fisheries Act*, R.S.C. 1970, c.F-14 as amended - Accused charged with an offence under section 33(2) - Depositing a deleterious substance into water frequented by fish - sewage into Willband Creek and Clayburn Creek - Actions of persons unknown - Failure by accused to exercise reasonable precautions - Fine of $5000 levied.**

Charges were originally brought against two defendants, but the Crown failed to call evidence with respect to the second defendant, the Corporation of the District of Matsqui so the count against it was dismissed.

The charge arose from a discharge of sewage into the Willband and Clayburn Creeks caused by a valve being tampered with by persons unknown. The Court found "that this incident was the deliberate and malicious act of an unauthorized and unknown person." The Court found as a fact that it couldn't have been an accident and it had occurred without the knowledge of the Defendants and its agents.

The primary issue to be determined was whether or not the Defendant was duly diligent in safegarding the installation and operation of its sewage box structure.

Held, the accused was found guilty.

The Court found that the accused recognized its responsibility to guard against unauthorized interference and had in place what can at best be called a "catch as catch can" inspection system of the sewage box structure. The accused could have taken a number of security steps to prevent interference with its system which might have included proper fencing, removal of the ladder from the side of the distribution box, and a more secure locking device on the wheel itself. The Court levied a fine of $5,000.

J. Cliffe and
F. Haar for the Crown.
R.C.P. Walker, for the Accused.

MacALPINE Prov. Ct. J.

The Information in this matter charges that Central Fraser Valley Regional District and the Corporation of the District of Matsqui: on the 25th day of September A.D., 1985, near the intersection of the Abbotsford-Mission Highway and McCallum Road, at or near the Municipality of Matsqui in the Province of British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: sewage, in a place under conditions where such deleterious substance entered water frequented by fish, to wit: Willband Creek and Clayburn Creek in violation of Section 33(2) of the *Fisheries Act* and did thereby commit an offence contrary to Section 33(5)(b) of the *Fisheries Act*.

Evidence in this case was heard on December 3rd and 4th, 1986, April 30th, May 1st and May 27th, 1987. During the course of the trial the Crown indicated that it did not wish to call any further evidence with respect to the Defendant Corporation of the District of Matsqui and the count was dismissed against the Defendant, the matter carrying on against the sole Defendant the Central Fraser Valley Regional District.

The circumstances are that on the 25th of September, 1985, at some time between nine and eleven a.m. a Mr. Wiens, who lives close by to Clayburn Creek, noted some dead fish in that creek and he called Federal Fisheries officers who responded and arrived at the kill site at approximately 1:15 in the afternoon. The area was examined by the Fisheries officers and at that time, and I think some time later, the waterway was walked by these officers from the area where they first observed the dead fish down to the Matsqui Slough and the evidence is that a couple of thousand dead fish of varied species were seen by the officers and the inference that I drew from the evidence was that probably a larger number than those seen had been actually killed because the officers were aware that a number of birds were feeding on the fish.

Coincidentally, other Fisheries officers in New Westminster were about to embark on some other duties and were awaiting the arrival of a helicopter to do that, when they learned of this fish kill and they consequently diverted to the Matsqui area and with the use of this helicopter the source of the problem was traced to an above-ground cement sewage distribution box adjacent to Willband Creek, which is an upstream tributary of Clayburn Creek. The Fisheries officers arrived there at 2:55 p.m. on the same date. They saw raw sewage oozing from the bottom, or flowing from the bottom of the box and flowing across the land through tall grass into Willband Creek.

A Fisheries officer climbed up onto this cement distribution box, which I take to be measurement, by the use of steel ladder on the side of the box and turned a wheel that was protruding upwards from a steel grating covering the top of the box and as a result of this turning of the wheel the external sewage flow was stopped. While all this was going on, evidence of a pollution problem was noted elsewhere by other people who were unaware of Mr. Wiens' discovery, that is the citizen who first discovered the dead fish, and the subsequent actions of the Fisheries officers, at what is called the J.A.M.E.S. Plant at Matsqui Slough, J.A.M.E.S being the name for the Joint Abbotsford-Matsqui Environmental Control System Sewage Treatment Plant. At that plant, Glen Dunville, the Superintendent of the Pollution Control Center, the man in charge of it, had it brought to his attention that fish had been seen on the surface of the Slough. He instructed his employees to take water samples to determine the dissolved oxygen levels, recognizing that low levels of dissolved oxygen could result in fish deaths.

Mr. Dunville thought there might be a pollution problem in the immediate area of the J.A.M.E.S. Plant, not from the sewage system itself but from other sources. I refer to his evidence, page 44 of the transcript on trial day 4, when he was asked;

> "Q. Now, would the reason be for taking the dissolved oxygen levels be a concern of yours at the time that there was sewage overflowing into the creek?
>
> A. No, that didn't occur to us at all at that particular point in time. We have an excellent system, but we thought maybe there was another source of something coming in. Now, whether it was ---"

And he broke off and was asked;

"Q. From somewhere else other than the system?

A. Yes, although we did check our system out to make sure that nothing was coming in, but ---"

What then happened was that he received a phone call from someone at the District of Matsqui advising him of a problem at the distribution box and he went here.

It might be observed, simply to have it on record, that the evidence seems to have disclosed that at some time in the past the sewage system, not the J.A.M.E.S. system but the original sewage system in the community, was an undertaking of the District of Abbotsford and Matsqui and that for a number of years these Municipalities looked after this system and then later on, the sewage system became a function and responsibility of the Central Fraser Valley Regional District. Certainly, the position of Mr. Reghts, who gave evidence in this trial, and other witnesses indicates that notwithstanding the different agencies that have at one time or another been involved there seems to be a close liaison among them all with respect to the provision of the sewage service and I believe, therefore, that that is why someone at the District of Matsqui called Mr. Dunville at the J.A.M.E.S. Plant telling him about this problem. And, of course, he went there with other officials and saw what had occurred.

Later that day the wheel and the valve were removed from the box, after the crew required to do that had been assembled. The job itself took fifteen to twenty minutes, the valve has not been replaced since but it is available in the shop nearby and could be reinstalled in short order if required. Now, I think for the record I should attempt to explain what the wheel and valve does and give a brief history of the distribution box and the use of it. It may not be an entirely accurate description of what goes on there and those knowledgeable in its operation and construction and so on may find fault with what I have to say, but I think my explanation will be sufficient for the purposes of this matter.

This concrete distribution box is a large concrete structure that, as I mentioned earlier, is covered on the top by metal grates which are locked into position by a padlock type of locking device. A threaded stem rises through this grating and there is a wheel on the stem and the turning of this wheel controls the position of a valve at the bottom of the stem. When the valve is up it is out of the way and permits sewage entering on one side of this box to simply flow through the box and out a pipe on the other side of the box which makes its way to the J.A.M.E.S. Pollution Control Center. When the valve is down it covers the exit pipe and prevents the flow of sewage out of the box and into the line leading to the intercepter line that goes to the treatment plant. This box was not constructed as part of the new modern J.A.M.E.S. Treatment Plant. It is, in fact, a leftover part of the old sewage lagoon system that was in operation in the Abbotsford-Matsqui communities in earlier days. However, it seems obvious from the evidence that when the new system was installed a few years ago it was noted that this distribution box could still serve some limited purpose, and that limited purpose is that it can provide a temporary shut-off of the sewage flow to enable Regional District workers to inspect and/or repair the line downstream. It does this by stopping the flow into the line out of the box and utilizing the capacity that is available in the upstream sewage system for a certain amount of storage. The evidence discloses that depending on the demand being made upon this system that the valve can be shut off for periods ranging between a minimum of three hours at peak periods of use, to as long as eight hours during non-peak periods and that was explained by witnesses here that there is simply room in the sewage line to backup the sewage to that extent. And, on I think two occasions in the last number of years, the distribution box and the valve in it had been used for just that purpose.

In earlier days, before this distribution box was tied into the new J.A.M.E.S. Plant, it contained three chambers, I believe it was three chambers, it is not particularly important, but the box had inner chambers which would enable a diversion or the distribution of sewage into ultimately one of three lagoons. And when that use was terminated and it became part of the J.A.M.E.S. Plant, the other chamber or chambers were plugged, and I believe the evidence disclosed that they were simply cemented in and these were referred to by witnesses as "spuds". So that ultimately the system was left, as I have described it no longer became a distribution box, it became simply a junction box. Sewage flowed in one side of it and out the other side. Now, I think that is a sufficient background and history of the distribution box itself.

In this case there were a number of admissions of fact and they were made on the third day of the trial on April 30th. There were some other admissions but with respect to the elements of the charge the admissions that I am referring to were referred to on pages 1, 2, and 3 of the transcript of that day. Firstly, it was admitted that on September 25th, 1985, sewage was discharged from the concrete sewage distribution box. Secondly, that that substance was deleterious to fish. Thirdly, the concrete sewage box structure and its related sewage system is owned and controlled by the Central Fraser Valley Regional District and was so owned and controlled on September 25th, 1985. Fourthly, that the discharge from the box entered the waters of Willband Creek and Clayburn Creek and was still deleterious to fish in those waters. Fifthly, the waters of Willband Creek and Clayburn Creek was still deleterious to fish in those waters. Fifthly, the waters of Willband Creek and Clayburn Creek on September 25th, 1985 were frequented by fish including coho salmon fry. Six, that the fish that frequent those waters ultimately contributed to the commercial fishery and the Indian food fishery, the sport fishery, the Fraser River and waters of the Strait of Georgia. I might just say, and I did not mention earlier, that Willband Creek flows into Clayburn Creek which flows into Matsqui Slough, which flows into the Fraser River. Number seven, the seventh admission, had to do with the voluntariness of statements made by an officer of the Regional District to fisheries officers and that person was Mr. Dunville, of course. The next admission that is of relevance is that Mr. Dunville is the plant superintendent of the J.A.M.E.S. Plant and on September 25th, 1985, could speak on behalf of the Regional District. Those are the admissions.

There is no doubt that this incident was the deliberate and malicious act of an unauthorized and unknown person. It could not have been and accident and it occurred without the knowledge of the Defendant and its agents and employees. In short, it was vandalism or sabotage. The evidence also reveals that this kind of thing never occurred before at this distribution box.

The Crown's position is that in the absence of Defence evidence, the Crown's case is proved beyond a reasonable doubt because the occurrence happened and refers to Section 33.4(3) of the *Fisheries Act* which covers unintentional deposits. And the Crown has also taken the position that the Defendant in exercising due dilligence would have to anticipate the likelihood of vandalism in any precautions it was taking in safeguarding its operation. Mr. Cliffe put forth the proposition that vandalism is an everyday fact of life in this age.

The Defence position is that the Regional District was duly diligent and acted reasonably in all of the circumstances. Mr. Walker has noted that the wheel device that had been used to block the flow and hence caused the spill was locked with an unusual screw device in that it needed an Allen wrench to release it and periodic inspections were made and there were no problems, I believe he said from 1978 to 1985. I may have that in error but I think the witnesses indicated there had been no problems since 1963 or whenever it was when this box began its service, and that is not contradicted in any way.

I haven't thus far made much reference to the operation of this valve and I haven't seen the valve and I hope that I understand how it works from the evidence that I have heard. Essentially there was a collar that fitted around the wheel and was secured in position by a lock-nut, a nut that was affixed to it and then secured there by a screw which required an Allen wrench to tighten it. And when this was in place the wheel wouldn't turn and the valve couldn't be moved. Obviously, on the day of the spill in September 25th, 1985, it was evident to all who attended that this had been tampered with and the wheel, when first discovered, had the valve in the closed position and again, it is quite obvious that some mindless person had attended there and turned this wheel and blocked the flow of sewage causing the spillage. Ordinally the spillage would have occurred over the top of this box after the capacity of the upstream system had been exhausted, but for some reason open of the "spuds" in the unused chamber had failed and the sewage made its way out of the bottom. I don't think it matters much where it came from, the effect of the unauthorized turning of this wheel would have been the same in any event.

The foundation law is certainly the *Sault Ste. Marie* case which creates by this type of offence a strict liability offence. The Supreme Court of Canada, in the *Sault Ste. Marie* case decided that there is a middle position between absolute liability cases and full mens rea cases and that, of course, is a strict liability offence. The Court said;

> "For offences occupying this middle position absolute liability is replaced by a doctrine of responsibility for negligence strengthened by a shift in the burden of proof. Thus there is open to the accused the defence of due diligence, of which reasonable mistake of fact would be one form.
>
> Strict liability offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act, prima facie, imports the offence leaving it open to the accused to avoid liability by proving that he took all reasonable care.
>
> The due diligence which must be established is that of accused alone and where the accused is, as here, a corporation the availability of the defence will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation whose acts are therefore in law the acts of the corporation itself."

The *Sault Ste. Marie* case, of course, involved contractual aspects but it dealt with the liability of the defendants, employees and agent essentially. Later cases have held that individuals and corporations can be held responsible for the acts of interlopers which thus has extended the scope of the *Sault Ste. Marie* case and the cases that hold that are, among them at least, *Regina v. Gulf of Georgia Towing*, *Regina v. City of Quesnel* and

Regina v. *CIPA Industries Ltd.* are cases which take that position. Although I think it should be noted that in the *Tahsis* case, His Honour Judge Drake in the County Court said that no one case can be considered a precedent for another, and so the result of each case will be determined by the factual circumstances involved. Now, certainly this is a case which does involved the acts of a stranger and a third party and it is necessary therefore to consider whether or not the Regional District was duly diligent in safeguarding its installation and the operation of it from vandals or saboteurs.

The evidence of Mr. Hickson is particularly useful in this particular case. In proceedings on day four of the trial, the 1st of May, 1987, Mr. Hickson gave evidence and he is a labourer for the Central Fraser Valley Regional District and has been involved in working in and about the sewage system in the community for some ten years or so. On page 16, Mr. Hickson was asked this question;

"Q. Now, in relation to that valve, what do you have to do with that as part of your duties?"

This is a reference to the wheel and stem on the distribution box. His reply was this;

"A. Just to check and make sure it wasn't tampered with. If they needed it shut off or anything could shut it off and open it, whatever."

Now, Mr. Hickson was called upon as a part of his duties to check on this distribution box, to see that it wasn't tampered with. This suggests clearly to me that tampering by unauthorized parties was contemplated by the Regional District and the officers who run that entity. Also, on page 16, Mr. Hickson was asked;

"Q. When was it that you last checked it prior to the spill?

A. It was about a week before, week or so."

On page 17 he explained how he climbed onto the junction box at the time of his checks to see that the wheel was tight and that nobody had tampered with the locking nut on it. He was asked this question;

"Q. Is there a pattern of inspection by you on this wheel device, do you come regularly or not?

A. No, because I'm on the flush truck most of the time, which is working for Abbotsford or Matsqui clearing their sewer lines.

Q. Yes?

A. So just when the truck's broken down or they don't need me, then I'll go out and check lines and stuff like that."

Now, he was then asked;

"Q. But in terms of this inspection you described to us, is there any reason that you recalled?"

That inspection was the inspection a week or two before the spill.

"A. Well, somebody had seen some tracks around there before so we just go out periodically and check it. I can't really say that I recollect anything special."

The evidence didn't disclose what kind of tracks were seen around there but I find from the evidence, infer from the evidence, that it was either vehicular tracks or footprints of something of that nature indicating human presence. That evidence was given in direct examination and in cross-examination Mr. Cliffe asked this question;

"Q. Sir, you will agree with me that your inspection of this particular box that you've seen a picture of, it's not a regular inspection, is it, it's not a regular thing, you don't go on a specific day, is that correct?

A. No I don't.

Q. You'd call it an irregular inspection, is that correct?

A. Yes."

And I miss a few questions and answers and he is asked;

"Q. Was it one week, two weeks, four weeks, how long prior to?

A. Within a two week period."

Mr. Hickson also related the manner of inspecting this distribution box, that is by climbing up on the top of it and checking it and he said there are steps up the side of the box and he climbed up those steps and he said you have to grab the wheel to get up onto the top. That is referred to on page 19 of the transcript in his answer on line 28. When he did that he not only checked the wheel but he looked down through the grates to ensure that nothing had been dumped in there that might block the sewage flow-through and, I'm trying to think now whether it was Mr. Dunville, I don't have a note of it in front of me now, but the evidence shows -- photographic evidence shows that in addition to this wheel and stem there are two holes in the grating, two larger holes in the grating, not the mesh itself of course, and the evidence is that those holes were left over from the early days of this box's use in the days of the sewage-lagoon system when other valves that were formerly on the box were removed. I think it is worth noting that because the evidence before me by the Defendant is that apart from tampering with this wheel and causing the sewage to overflow, really the only other dangers that were forseen there were the dropping of things through the grating into this box causing a line blockage. That witness indicated that those concerns were the dumping of cement into the box or the dropping of rocks into the box. Now, I think the former is highly unlikely and probably was mentioned by the witness only because that is the manner in which the sewage authorities themselves blocked the unused chambers. But to contemplate a vandal dumping cement in there, I think is perhaps stretching the point. However, the dropping of rocks seems to be a more likely possibility and the Regional District not having mended these holes where the valves had once been seemed to me might invite throwing of just such objects into the box, but that did not occur in this case, it is just an observation I made considering the evidence after the trial had ended.

Mr. Dunville, the superintendent, at page 27 on day four of the trial when he was asked about the inspection system and the general checking of the distribution box said;

> "A. ... the joint sanitary collection system is just a small system so requires not a great deal of attention, but you rely on your workers to look after that.
>
> A. And Mr. Hickson who just testified was one of the workers?
>
> A. That's correct, yes."

That indicates to me that -- I shouldn't say that, I refer to the evidence of Mr. Hickson and Mr. Dunville, indicates to me that the Regional District recognized its responsibility to guard against unauthorized interference and had in place what can at best be called a "catch as catch can" inspection system of this box. One of the reasons for this that was alluded to by the Defence witnesses and also by Mr. Walker in his summation, was that this distribution box is in a relatively isolated spot. It lies several hundred feet west of McCallum Road which is a regular thoroughfare in the Municipality of Matsqui but it is in an area of scrub bush and swamp, tall grass, and isn't the sort of place that people in their ordinary travels would come across. So while it is on the one hand isolated in that respect it is nonetheless close at hand and doesn't require any great amount of effort or travel to get to it. As well, the evidence establishes without a doubt that the Regional District had not taken any steps or put in place any perimeter precautions, if I can call them that. There was no ditching to contain an overflow should one occur accidentally or deliberately; no berm had been put in place to block the flow of the sewage should it occur from this box to the creek nearby; and there was no fenced enclosure of any kind around the distribution box itself. There was a gate on the road that leads into this area but the gate stood alone and although locked, apparently, and sufficient to stop vehicular access, could be avoided by simply walking around it. I think it is most relevant to note that while none of these precautions were taken, at the same time the existence of a ladder on this distribution box might well have proved to be a temptation or an invitation to persons in that area to climb onto it and to be put in contact with this wheel.

The Defence has argued that the facts in this case are not too dissimilar from those in the *Cloverdale Paint* case, but that the important element in this case is that this wheel was locked and there is no doubt that it was locked. It wasn't locked with what we ordinarily consider to be a lock, that is a padlock or a chain and lock padlock type of system, but it was a locking device that required the use of a particular type of tool to release the mechanism so that the wheel could be operated. I suppose there are many people who do not know what an Allen wrench is and I think that it is probably simply common sense to say that very few people would ordinarily carry such a wrench with them. In fact, on the date of the last inspection prior to September 25th, 1985, Mr. Hickson himself testified that he didn't have an Allen wrench with him either on his person or in his work truck should he have needed one to deal with this wheel. So, it is a locking device that certainly is much more secure than simply the tightening down of a nut on this stem. What I have to decide, I think, and this is ultimately what the only issue is here, is whether or not that was sufficient in light of all of the other circumstances.

I have come to the conclusion that it was not; that there were obviously a number of security steps that could have been taken by the Regional District to prevent interference with its system which might have included proper fencing, removal of the ladder from the side of the distribution box, and indeed a more secure locking device on the wheel itself.

This, of course, is especially so in light of the evidence that the Regional District had some apprehension about the possible occurrence of tampering.

And so, for those reasons I have come to the conclusion that the Crown has proved its case beyond a reasonable doubt and that the Regional District was not duly diligent in preventing interference with its system.

The cases that I have referred to are all listed in the books of cases provided by the Crown and the Defence. I have not referred to all of them in my reasons. I could provide a list of them to the Court Recorder for record purposes. I have read all of the cases submitted by both counsel and, in fact, have made notes on all of those cases but I have not referred to all of the notes that I made on each of those cases. They are available and I will provide simply a list of the cases and have them included in the file. That includes, of course, the *Cloverdale Paint* decision rendered just a few weeks ago by His Honour Judge Campbell in Cloverdale. That is the only other case that is not contained in the books.

SENTENCING

Well, the matter of sentence really doesn't present any great difficulty. There are, fortunately, not a large number of similar cases and I certainly accept the submission that the range varies between thirty-five hundred dollars and ten thousand dollars.

There are a number of factors to consider, that is the degree of culpability and the nature of the enterprise, the extent of the environmental damage, all of which counsel have alluded to.

Certainly this case was not a deliberate act by the Municipality -- or by the Regional District, rather, but it occurred as a result of, in my view, a failure to fully carry out its responsibilities. And some liability must attach for this negligence. Certainly any amount of fine that is imposed by the Court would have been better spent by the Regional District in building a fence or some other measure to prevent this kind of thing occurring.

I think it is important too, as Mr. Walker has pointed out, that there was no rehabilitation of the waterway required, other than to stop the flow and let nature take its course, and that the fish kill did involve certainly a number of nuisance fish. But, of course, I gather it's not possible to pick and choose what kind of fish are going to be killed, once a deleterious substance is in the water whatever is there suffers. And, in some instances, the public welfare may be rewarded by the presence of more nuisance fish than others but that certainly isn't always the case.

The Regional District, in this case, was co-operative. I think that, again from what I take from the evidence, there ought to have been a quicker response by the J.A.M.E.S. Plant people, it seems somewhat surprising that they didn't even contemplate that this might be a problem in their own system, at the outset. And one would have thought that, perhaps hindsight is better in this case, but one would have thought that this would be one area they might have checked almost immediately having recognized that it is an area where problems could occur. But that didn't happen and I think the evidence has disclosed, however, that Mr. Dunville was just about to phone the Fisheries people when he received this call from the District of Matsqui about the problem. But, again, there was no contact made as soon as the problem was discovered at that J.A.M.E.S. Plant, which is before noon on this September date, until three o'clock, approximately, in the afternoon. One might have expected that Mr. Dunville or a member of his staff might have called in or made contact with the Department of Fisheries and Oceans and some other, perhaps Environment Canada, some other officials to at least get some more help. But, apart from that, certainly once the problem was discovered the Regional District was responsive and, as Mr. Walker has said, took steps to clean up, removed the valve so that this couldn't happen again. And, of course, I know from the evidence that if there is a need in the future to shut off the line at that point, at the box, this can be re-installed, perhaps at some inconvenience but it certainly can be reinstalled.

This case is very much like the *City of Quesnel* case. It is not certainly on all fours with the *North Vancouver* case decided by His Honour Judge Paradis. As I mentioned, in a review of that case, that system was set up to specifically divert the sewage, the overflow of sewage into the creek should it be necessary and, of course, that's what happened. But this case is not like that. But the penalties in those two cases were the same. I think that the penalty in the *City of Quesnel* case, for the first-day offence, and the *North Vancouver* case establishes the normal sentence in cases of this kind. And, of course, they also both involve municipal agencies or agencies supported by the tax payers and run by elected officials.

And so, without more, I am going to follow the guidance of the judges in those cases and impose, in this case, a fine of five thousand dollars.

Because it is a municipal body or a regional body carrying on a provision of service to municipalities and is supported by tax dollars which are raised at certain times of the year, as you've said Mr. Walker, as opposed to a commercial undertaking, I will, because of the budgetary problem that you have explained, give the Regional District until the 31st of March, 1988 to pay this fine.

NORTHWEST TERRITORIES TERRITORIAL COURT

R.v. LE CHENE No. 1

THOMAS Terr. Ct. J. Yellowknife, April 21, 1987

***Arctic Waters Pollution Prevention Act* R.S.C. 1970 c.2 (1st Supp.), as amended - Depositing waste into Arctic Waters - JET-B fuel at Hall Beach NWT, contrary to subsection 4(1) - Accused pleads guilty.**

Sentencing - A fine should impress responsibility to act in the most careful manner in protecting the environment of the North - Fine of 14,000.00 levied.

The accused, an oil tanker with the Canadian Registry, pleaded guilty to a charge of depositing waste, being JET-B fuel, into Arctic Waters, contrary to subsection 4(1) of the *Arctic Waters Pollution Prevention Act*, R.S.C. c.2 (1st Supp.), as amended. The charge arose from the spillage of fuel during an unloading of the oil tanker by pumping into storage tanks on the shore at Hall Beach N.W.T. The fuel was being pumped through twenty jointed 100 ft. long units of 4 inch inside diameter floating hose, under pressure from a pump on the vessel being continuously manned by an employee of the Defendant. During this procedure, the end of a hose section near the shore slipped off its half coupling spigot, for reasons which could not be definitely established.

The hose was old and had required replacing by the date of the spill. The usual and routine patrolling of the sea hose lines by the Defendant's personnel in a small boat had not occurred. Further, the Defendant vessel did not process a powerful, trainable searchlight that would be capable of effectively monitoring the hoses in the dark of night.

The Court concurred with counsel's submissions that responsibility for the offence lay somewhere between the situations found in the *Queen v. Esso Resources Canada* Limited (1983) *N.W.T.R. 143*, and the *Queen v. Canadian Marine Drilling Ltd.* (1984) *N.W.T.R. 48*.

In the *Esso* Case employees caused a 4,480 gallon oil spill when they were drinking alcohol and fuel asleep on the job. No environmental damage occurred in that case and a fine of $8,000.00 was levied out of a maximum available at $100,000.00.

On the *Canadian Marine Drilling* case, one of the barges, in which the company was storing waste oil products, cracked spilling a number of thousands of gallons into the Tuktoyaktuk Harbour over a period of three days. The company had not taken proper precautions to avoid the spill and fined them 20,000.00 out of a maximum available of $50,000.00.

The Court held that the intent of a fine is to impress upon the Defendant and others that their responsibility is to act in the most careful manner in protecting the environment of the North.

The Court levied a fine of $14,000.00.

G. Bickert, for the Crown.
J. Vertes, for the Accused.

THOMAS, Terr. Ct. J.

The ship Le Chene No. 1, an oil tanker with Canadian Registry is charged that on or about the ninth day of September, 1985, at Hall Beach in the Northwest Territories, did deposit waste, being JET-B fuel in Arctic Waters, contrary to subsection 4(1) of the *Arctic Waters Pollution Prevention Act*. This appears to be the first prosecution under the Act which was proclaimed 19 years ago for the purpose of protecting the aquatic environment.

Similar offences are referred to in and have been prosecuted under the *Canadian Shipping Act, Ocean Dumping Control Act, the Fisheries Act, the Northern Inland Waters Act, and the Territorial Acts* relating to the care of the environment, making it appropriate for this Court to refer to precedents resulting from similar types of offences under these other Statutes.

The Defendant vessel has entered a plea of guilty to the charge with a complete and detailed Statement of Facts having been jointly filed by Mr. Bickert as Prosecutor, and Mr. Vertes as Counsel for the Defendant vessel.

Briefly, the facts show that the vessel was unloading, by pumping JET-B Fuel to storage tanks on shore at Hall Beach, N.W.T., through twenty joined one hundred foot long units of 4 inch inside diameter floating hose, under pressure from a pump on the vessel being continuously manned by an employee of the Defendant. Because there is no permanent wharf available, the ship was anchored and moored in a tidal stream in an exposed position about 1600 feet from shore.

The pumps were stopped on two occasions when the type of fuel was switched but had been pumping for a few hours before switching to the JET-B fuel, which then was pumped from about 15 minutes past midnight until 45 minutes past midnight, when the type of fuel passing through the hose was confirmed.

The pumping resumed at 01:00 hours when it was assumed that all systems were working properly. The agent for the local D.E.W. Line Site, Mr. Liddle, then went to check some other tanks about one mile away and returned at about 01:45 hours to note that the JET-B Fuel did not appear to be entering the storage tank because the hose on the beach was flat. Mr. Liddle found that a coupling for the floating hose sections had come apart about 100 feet from shore but the release of the fuel on the water had not shown any discernable difference in the pumping pressure on the ship's gauge.

Calculations showed that approximately 87 cubic meters, or 19,140 gallons of JET-B Fuel had been pumped into the sea over a period of approximately one hour.

It was determined that the failure of the hose had occurred when the end of the hose section had slipped off its half-coupling spigot, for reasons which cannot be definitely established.

It was admitted that the hose, although in good operating condition in June 1985, was subjected to rough treatment in the course of such sea-lift operations as it has to be hauled at times over rocks and gravel. The hose was old and required replacing by September 1985.

Some part of the hose had also broken and had been replaced within days before the break which caused the discharge resulting in these proceedings.

The Ship's employees were required to repair sea hose at another D.E.W. Line Site before arriving at Hall Beach.

A Canadian Coast Guard official would, although under no duty to do so, observe the discharges from the tanker ship. At the time of the offence, the only person on shore and the only person who was observing the operation, was the D.E.W. Line employee who was checking to ensure that the on shore tanks received the proper type and quantity of the product. He also was under no duty to monitor or assist the Defendant in its supply to the on shore tanks.

The unlawful discharge occurred during a cold, dark night when the usual and routine patrolling of the sea hose lines by the Defendant's personnel in a small boat was not occurring.

It is also admitted that the Defendant vessel did not possess a powerful, trainable searchlight that would be capable of effectively monitoring the hoses in the dark of night.

The Defendant vessel did not have equipment and materials aboard to effectively contain, recover or disperse a fuel spill. Fortunately the quantity and type of fuel spilled was such that the natural flow of tides and the prevailing weather dispersed the product out to sea so that no environmental damage or harm to the sea around Hall Beach occurred, which sea is rich in the sea mammals and fish harvested extensively by the local population as a staple food and income source.

APPROACH OF THE COURT

With no environmental damage, what approach is appropriate for the Court to take on sentencing for a violation of the *Arctic Waters Pollution Prevention Act*?

STRICT LIABILITY OFFENCE

Having reviewed *R. v. City of Sault Ste. Marie, (1978) 2 S.C.R. 1299*, 85 D.L.R. (3d) 161, 40 C.C.C. (2d) 353, I am satisfied that the Statute falls in the category requiring Strict Liability, where it is not necessary to prove intent by the Defendant but where the doing of the prohibited act imports an offence unless the accused can prove that he took all reasonable care and had done all that he could have done in the circumstances to have avoided the prohibited act.

On the facts, I am satisfied that the accused ship did not, at the time of the pumping JET-B Fuel into the sea, exercise all the care and skill that would be appropriate, and did not take all reasonable precautionary measures to ensure that an oil spill would not occur, or if it did occur, that it would be immediately detected.

On this basis, the plea of guilty was accepted and a conviction was entered.

DUTY OF THE ACCUSED

With the great potential for harm to the Northern environment, people and businesses operating in the Northern extremes of Canada have a substantial burden to take precautions to protect the delicate balance of nature in this remote part of the country which can be so easily damaged, and when once damaged is so difficult and sometimes even impossible to repair.

In Public Welfare offences, the protection of the social and public interests is of paramount concern to the Courts as directed by such forms of legislation. Deterrence in the commission of such offences is accomplished by the imposing of meaningful penalties for the failure to provide for the acceptance and the enforcement of the highest standards of care for the purity of the air, land and water to ensure the protection of all forms of life and the maintenance of a suitable and lasting physical environment.

Mr. Justice Morrow, in *R. v. Kenaston Drilling (Arctic) Limited, (1973) 12 C.C.C. (2d) 383, 41 D.L.R. (3d) 252*, directed, and other Northwest Territories Courts have confirmed, that Courts should deal with pollution offences with resolution and should stress the deterrent aspect of sentencing in the hope that offences will not be committed that might damage or have the potential of injury to a sometimes fragile Northern environment.

Mr. Justice De Weerdt again confirmed that the requirements of the Public Welfare Statutes are to be enforced in such a way as to deter a repetition of the offence and to deter others from committing offences of this kind, as reported in *R. v. Placer Development Ltd. (1982) N.W.T. Supreme Court Number 2392.*

Counsel have been most helpful in their reasonable and well reasoned submissions, acknowledging that the misconduct or the responsibility for the offence, lies somewhere between the situations found in the *Queen v. Esso Resources Canada Ltd, case, N.W.T. Territorial Court, March 1983, (1983) N.W.T.R 143, and the Queen v. Canadian Marine Drilling Ltd., N.W.T. Territorial Court, reported in 1984, N.W.T.R. 48.* The Esso company employees, who were properly trained and directed by their employer, caused a 4,480 gallon or 22 cubic meter oil spill when they were drinking alcohol and fell asleep on the job. Fortunately no environmental damage was done in that case, where the fine imposed was $8,000.00 out of a maximum available at $100,000.00.

In the *Canadian Marine Drilling* case, the company had stored waste oil products, referred to as slops, in barges with no activity or scheduled plan for the disposition of the material. When one of the barges cracked and spilled a number of thousand gallons into the Tuktoyaktuk Harbour over a period of three days, the company expended a great deal of money in its efforts to clean up the site, but was found guilty under the *Fisheries Act*, R.S.C. 197 - C.F. - 14 - and amendments thereto, because such spillage was foreseeable and the company had not taken proper precautions to avoid the offence. In that case the Defendant was fined $20,000.00 out of a maximum available of $50,000.000.

The maximum fine under the Statute before this Court is $100,000.00.

With the intent that a fine is today to be imposed to impress upon the Defendant and others, their responsibility to act in the most careful manner in protecting the environment of the North, I accept the general recommendation of Counsel and determine the fine to be in the amount of $14,000.00, to be paid forthwith -- on default, to be dealt with under Section 648 of the *Criminal Code*.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. CHET CONSTRUCTION LTD.

MacLEOD, Prov. Ct. J. Port Alberni, June 11, 1985

***Fisheries Act*, R.S.C. 1970, c.F.-14, as amended - Accused found guilty of charge under section 31(1) unlawfully carrying on a work or undertaking resulting in the harmful alteration, disruption or destruction of a fish habitat - Disruption of fish habitat in Close Creek, Meares Island - Failure to exercise due diligence - Section 33(7) order considered - Fine of $1,500.00 levied.**

The Court found as a fact that between June 6, 1984 - August 24, 1984 the accused carried on work at Meares Island and did cause alteration of fish habitat at Close Creek.

Held, the accused was found guilty.

Photographic evidence demonstrated that the construction company could have taken a little more care in the work involved. The Court was not convinced that Chet Construction Ltd. had done everything it could to stop the alteration or destruction of fish habitat, and thus the accused had not met the due diligence defence. While the Crown asked for a section 33(7) order, the Court refused since it appeared that so many organizations and people would be involved. A fine of $1,500.00 was levied.

J.D. Cliffe, for the Crown.
C. Thorton, for the Accused.

MacLEOD, Prov. Ct. J.

Well, the charge is that Chet Construction Limited between the 6th of June, '84 and the 24th of August, '84, at Meares Island did carry on a work or undertaking, to wit: that resulted in the harmful alteration, disruption, or destruction of fish habitat, to wit: Close Creek, being Canadian fisheries waters, in violation of Section 31(1) of the *Fisheries Act*.

The Court, of course, is mindful of the fact that the company itself was unrepresented except for the president, which puts of course the company in a situation where to give his own personal evidence in the whole regard is a bit on the lean side because he wasn't at the premises on Meares Island at all times and left it, of course, to his superintendant or foreman which had worked with him for a number of years.

Mr. Thorton pointed out that dealing with the fisheries the usual thing is when they do have meetings and of course, it's been my experience in court too that the fisheries people are quite thorough in laying down the law to individuals, contractors, logging outfits to what they can do and can't do and when they're going to do what they're supposed to or they've agreed to do with some other individual. This didn't happen, but at least there was the conversation regarding the whole episode during the time previous to the contract being awarded. The Court of course, is only concerned in if the Crown has proven certain ingredients of the offence and then, of course, the Court has no alternative except on some occasions, to find them guilty.

I'm satisfied that Chet Construction Limited was carrying on work between the time of the events and I'm satisfied that Close Creek was a Canadian fisheries water and in view of the evidence produced today I'm quite satisfied that there was disruption of fish habitat in that area.

The defence, of course, is that he did, what we call a due diligence defence, I suppose, in law, which does give -- in other words, this is not an absolute offence, but - throwing a bucket of sand in the fisheries stream, for instance, doesn't necessarily result in a conviction. In other words, it's not absolute. You do have the right that if you have done something -- done all you possibly could to ameliorate the damage in question or as a result of the work you had to do the damage in question than the Court might accept the fact that you did everything you could from stopping the alteration or destruction of fish habitat.

However, the evidence to me appears such that the company limited -- the company, construction company with the and the work involved together with the photographs in two or three portions of Close creek that they could have taken a little more care in the work involved and done a far better job than was -- appears in the pictures. In other words, in essence, I'm finding in the facts that there was a destruction of fish habitat and the company will be found guilty of the offence. All right.

Wish to speak of penalty at all?

SENTENCING

MR. CLIFFE

Yes, Your Honour. I draw Your Honours attention to section 31(3) subparagraph (a) of the Fisheries Act and this, of course, this is a summary conviction proceeding and it provides for a fine not exceeding five thousand dollars for a first offence and not exceeding ten thousand dollars for each subsequent offence. Of course, this is the first conviction for Chet Construction Limited. Now, there is also a provision that I want to draw Your Honour's attention to that's applicable to prosecutions under Section 31 of the *Fisheries Act* and that is section 33 subsection (7). I'm not certain whether Your Honour has a copy of the *Fisheries Act*. I would like to read that to Your Honour and I'll a file a copy with you. Subsection (7) of section 33 is a section that reads as follows:

> "Where a person is convicted of an offence under this section"

and as I've told Your Honour, this applies to section 31 prosecutions

> "the Court may, in addition to any punishment it may impose, order that person to refrain from committing any further such offence or to cease to carry on any activities specified in the order the carrying on of which in the opinion of the Court will or is likely to result in the committing of any further such offence or take such action specified in the order as in the opinion of the Court will or is likely to prevent the commission of any further such offence."

Now, I'm submitting to Your Honour that what this section allows Your Honour to do from the habitat concerns at Close Creek is to order that certain remedial work be done on Close Creek by the company. And I'm advised and unfortunately I don't have the details - I didn't want to obviously presupposed the outcome of a prosecution - that there is work that should be done, in the Crown's view, by the company and that the Crown in that regard is more concerned with the remedial work being done that it is with respect to a, I submit, fine in this case. But the Crown would like the opportunity, if Your Honour is prepared to consider as a part of a sentence of a fine, a order of remedial work done at Close Creek by the company, an opportunity to present to Your Honour what has to be done and some estimate of what cost may have to be considered here. Now, I would like to present Your Honour with the section 33(7) here for Your Honour's consideration.

Now, I have some authority. One case that Her Honour Judge Huddart of the County Court of Vancouver is an indictable offence of alteration of fish habitat, a case called *Regina versus Jackson Bros.* did consider in fact that type of sentence and a specification in a court order that certain specific work be done as well as a fine imposed in that particular case. So there is some authority from the County Court of Vancouver with respect to the utilization of subsection (7) of section 33 in these types of cases.

Now, what I'm submitting to Your Honour is that Your Honour may wish to consider that in sentence here but I would be asking that perhaps the case be adjourned so that the fisheries people and or Mr. Thorton or his representatives attend on site again and determine what work has to be done specifically so that proper representations could be made to Your Honour.

. . .

(Editor: Counsel for the Crown suggest an adjournment to allow fishery officials and the accused to discuss contents of the order. Instead, the Court questions Mr. Thornton and others about the present condition of the site.)

MR. CLIFFE

Your Honour, as you can see, this (sic) is a decision of Her Honour Judge Huddart of Vancouver on September the 6th, 1983.

And the case, as I've indicated, is probably a more serious case than this case because the Crown did proceed by indictment. It's different in we're dealing with a logging company and the concerns of again Coho and Chum spawning habitats and estuary of Angus Creek in the Sechelt Peninsula. Now, if Your Honour turns — Her Honour Judge Huddart deals with the leading case in sentencing of corporations which is the *United Keno Hill Mines* case on page three of the judgment. It continues on and it's not until she considers the --near the end of the judgment, actually it's on page seven (sic) of the judgment, she indicates at the first real paragraph:

> "Therefore, I have concluded that I should impose a fine of $6,000. In addition to this fine Jackson Bros. is to take the following action under the supervision of James Alexander Steven Jr. of such successor as he may design — designated"

pardon me,

> "in writing".

And then proceeds to recommend six technical cleanup terms and in particular there's hydro-seeding; there's rip-rapping of rock; there's to remove materials which originated from side-case operations and so on.

Now, of course, penalty has to -- and Her Honour does deal with it. Obviously he may find that, Mr. Aliason or maybe someone from his division might go out there and find out that we need a abyss made. Maybe this is kind of an absurd example, there's got to be a million dollars of work over there. Well, obviously the Crown is not in a situation Chet Construction being a small construction company saying that Your Honour do that. Obviously to break the company. But there may be aspects of it that may be easily remedied by the company going back to the site and actually doing this kind of work at not that great of an expense.

If Your Honour is not mindful of that type of order in this case, the Crown would be seeking a fine at the high end of the maximum fine of five thousand dollars in this case.

MACLEOD, J

(Editor: The Court questioned Counsel for the Crown and others as to their knowledge concerning ongoing work at the site in the *Jackson Bros.* case. A suggestion was made that a forestry official should be brought in to help determine the contents of the order.)

Oh, I think in the circumstances, it's getting to be a real big endeavour when we have to bring everybody in. There hasn't been any complaint from the forestry service I take it? Is this thing in operation, the pipeline?

MR. THORTON

Parts of it are.

MR. CLIFFE

Here's my point, Your Honour, is if Your Honour's not considering a remedy, the Crown does take the view that even though this is a summary conviction offence, damage here as Your Honour has seen through the pictures, it was a serious matter and the Crown would suggest Your Honour that a fine in the high side would be appropriate in this case.

MACLEOD, J

You've been in business for how long? Seven years? Eight years?

MR. THORTON

Almost nine I think Your Honour.

MACLEOD, J

There will be a fine against the company of fifteen hundred dollars.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. C.I.P. INC.

SCHMIDT, Prov. Ct. J. Campbell River, December 16, 1986

Fisheries Act**, R.S.C 1970, c.F-14 as amended - Accused pleaded guilty to offence under section 33(2) - Depositing a deleterious substance into water frequented by fish - A mixture of tetrachlorophenate and pentachlorophenate into Tahsis Inlet.**

Sentencing - Section 33(7) order granted - Fine of $10,000.00 levied.

The accused corporation pleaded guilty to one count of depositing a deleterious substance in water frequented by fish, contrary to section 33(2) of the *Fisheries Act*. The charge arose out of an incident wherein an employee of the accused drove his truck loaded with wood in an aggressive manner into a dip tank containing chlorophenates, a toxic chemical used in the industry to prevent the discolouration of timber. Wave action resulting from the driver's activity, accompanied with the already raised level of chlorophenates due to heavy rainfall and the inadequate functioning of the dip tank, resulted in the spillage of between 700-2,200 gallons of chemical. The chlorophenate found its way into nearby storm drains and hence into Tahsis Inlet.

The Court held that the dip tank was grossly inadequate by way of design and disrepair brought about by negligence and expediency. The Company was lax in its duty to have in place a contingency plan in the event of a spill. It continued to operate an inadequate facility and was powerless to minimize damage when an accident occurred.

In an attempt to encourage the type of co-operation after the fact and because the company has repaired the obvious inadequacies, the Court assessed a fine of $10,000. A section 33(7) order was also granted wherein the Court endorsed a plan developed by the company and environmental agencies to further assist in the prevention of environmental damage from the use of chlorophenates.

John D. Cliffe, for the Crown.
N.E. Daugulis, for the Accused.

SCHMIDT, Prov. Ct. J.

The accused corporation has pled guilty to one count of depositing a deleterious substance in water frequented by fish, contrary to Section 33(2) of the Fisheries Act. The deleterious substance deposited on January 14th, 1986 was chlorophenate. The deposit of the chlorophenates resulted from the negligent use of a dip tank designed for the dipping of bundles of lumber in the chlorophenate to prevent discolouration.

It is recognized that the use of chlorophenates for lumber treatment is essential for B.C. timber to maintain its overseas market. The method employed by the accused company was to drive into a dip tank with a carrier and thus submerge the wood, and then drive out the other side and deposit the wood. The facility had been used for many years and, in fact, the employee using the facility on January 14th, 1986 had in fact been employed in this operation for seventeen years.

The chlorophenates contained in the dip tank are recognized as the most toxic chemical in use in the industry. It is toxic to marine and human life. The concentration of point one (.1) parts per million is considered lethal to fish. Also of grave concern is that the chemical tends to remain in residue form in the aquatic environment. The toxicity of chlorophenates has been recognized, and in 1981 a document was published stressing the effect of chlorophenates on the environment. As a result of that study, in 1983 industry and environmental agents published a Code of Good Practice for the use of chlorophenates.

This corporate accused has recognized the danger and has employed a Mr. Griffiths who has a degree in marine biology, and lab technicians to address this problem and others throughout the many corporate sites with respect to the environment. Apparently he has attended this site and made recommendations and trained staff. Supervisors were expected to be aware of material contained in certain manuals; those manuals contained alerts for procedure while working around the dip tank.

The company was also working on a draft contingency plan for chlorophenate spills. The second draft was prepared by Mr. Griffiths, October 18th, 1985, and a third draft was apparently prepared January 12th, 1986. These drafts had not yet found their way past planning stages and there was no contingency plan for chlorophenate spills in place at the mill at the time of this spill.

As stated earlier, the facility was an old one. The photographs in Exhibit 4 and 5 reveal that the cement curbing containing the chlorophenates was broken, and at one point, as revealed by pictures three and fifteen, was broken almost to the level of the chlorophenates, and appears to have been in that condition for a long time. In addition, the roof is inadequate and does not prevent rain from entering the tank and possibly overflowing it. The evidence is that the tank level raised some two to five inches in two days as a result of rainfall. The roof inadequacy was further exacerbated by a broken roof drain system which drained water into the tank. The possibility of overflow was heightened further by a catch drain in the entranceway being cemented in. The catch drain, if effective, would have diverted the overflow coming up the entranceway back to the tank. It was cemented in because it often became clogged with debris. There was a drain at the exit, but at that -- at the time of this spill it too was clogged.

I find that the dip tank was grossly inadequate for the containing of chlorophenates. It was inadequate by way of design and disrepair brought about by negligence and expediency. The tank was in such a state of disrepair in relation to its possible environmental impact, that it appears incredible that a company which purports to be as concerned as this accused about chlorophenates, could completely overlook what appears from even the photographs, to be an obvious hazard.

Even setting aside the 20/20 vision of hindsight, the court cannot conceive of trained and concerned personnel not viewing these inadequacies and recommending immediate change. A final observation with respect to the site is necessary. Exhibits 2, 3 and 5 show the mill site built at the head of the Tahsis Inlet on the estuary of the Tahsis River. This is an environmentally sensitive area. The head of the inlet is the staging ground for two major salmon spawning grounds. Numerous other species are in the waters, and sport and commercial fishing is one of the uses of this area. The level of chlorophenates at the outfalls from the storm drains after the spill, were well in excess of lethal levels.

The spill itself occurred when an experienced carrier driver drove a load of wood into the tank in what was described as an aggressive manner. Apparently the rainwater had raised the level to an unacceptable standard and the use of the tank on this occasion was intended to bring the level of the tank down. As a result of the driver's activity, between seven hundred (700) and twenty-two hundred (2,200) gallons of the chemical were spilled by wave action, and found its way into nearby storm drains and thence into Tahsis Inlet. No contingency plans were in place to prevent the chlorophenate going into the storm drains, and consequently none was contained.

Since the spill the company has expended some twenty-two thousand dollars ($22,000) on the tank as a stopgap measure to prevent spillage. The curbs have been raised, the roof repaired and expanded and the catch drain reinstalled. These were the obvious requirements that should have been acted on when the dangerous nature of the chemical was revealed. The company has, since this charge, cooperated with environmental agencies and arrived at a plan which will further assist in the prevention of environmental damage from the use of the tank. The plan calls for considerable renovation of the facility and procedure in keeping with the known toxicity of the chemical. By 1989 the dip tank will cease to be used.

Crown Counsel and Defence Counsel have requested that the Court endorse the plan, and I do not hesitate to do so. The Court therefore orders, pursuant to Section 33(7) of the *Fisheries Act*, that Exhibit 7, as worded, become a court order. Both counsel have urged that in view of the order under Section 33(7), a nominal fine of one thousand dollars ($1,000) would be appropriate. The idea is to encourage the cooperation of companies and environmental agencies in positive action plans to reduce environmental hazard. This is a worthy endeavour. It unfortunately comes too late to prevent this spill. Companies and individuals must be encouraged to be diligent before offences occur, and that encouragement is done by the courts by way of penalty, otherwise there is little incentive for them to do other than wait for the first spill before necessary changes and procedures are in place.

This case is a prime example of a company ignoring the necessity of change to its facility in keeping with the potential hazard. It was lax in its duty to have in place contingency plans should a spill occur. The company continued to operate an entirely inadequate facility and were powerless to minimize damage when an accident occurred. In an attempt to encourage the type of cooperation after the fact which has occurred here, and because the company has repaired the obvious inadequacies, the Court will assess a fine of ten thousand dollars ($10,000), in default to distress.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. C.I.P. INC.

SCHMIDT, Prov. Ct. J. Campbell River, December 16, 1986

THIS COURT ORDERS THAT pursuant to s. 33(7) of the **Fisheries Act**, CIP Inc. shall:

1) Re-issue manuals for the handling and application of chlorophenate for the training of employees and for the prevention and control of spills.

   Confirmation of completion of these documents should be provided to the Environmental Protection Service and the Department of Fisheries & Oceans within 2 months of the date of this Order.

2) Effective immediately and henceforth, a lumber carrier will be dedicated to the dip tank area.

3) The existing dip tank and drip/dry area will be altered and expanded to a size that will provide 2 1/2 hour combined drip and drying time as per the attached plan. The alteration and expansion, with the exception of paving, to be complete by February 28, 1987. Paving to be completed at the earliest reasonable weather permitting opportunity thereafter and the entire project to be completed not later than May 31, 1987. The company will make every reasonable effort to complete the project before the deadline stated.

4) As of May 31, 1987 or date of completion of the project, CIP Inc. will have established and maintained procedures providing for a minimum of 2 1/2 hours combined drip and drying time and will so instruct all appropriate employees, and shall instruct all appropriate employees, that if after 2 1/2 hours combined drip and drying time there is visible liquid, pouring, running or rapidly dripping from the wood the load will be retained in the drip/dry area until such has ceased.

5) By December 31, 1989, the dip tank will no longer be used unless an environmentally acceptable sap stain protective can be utilized.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. C.I.P.A. INDUSTRIES LTD.

VARCOE, Prov. Ct. J. Maple Ridge, July 29, 1983

Fisheries Act, R.S.C. 1970, c.F-14 as amended - Accused found guilty of five counts under section 33(2) - Depositing a deleterious substance into water frequented by fish -Oil and wood preservatives into the Fraser River.

Sentencing - Mitigating factors - Not a deliberate discharge - Not aware of significant effect of substance on environment - Total fines of $18,000 levied.

The accused was charged with five counts under section 33(2) of the *Fisheries Act*, R.S.C. 1970, c.F-14 as amended, depositing of a deleterious substance into water frequented by fish. The first count arose from a deposit of oil which emanated from a hydraulic machine used during a debarking process. The oil spill congregated on a floor, then flowed through a deliberately made hole in the floor, down through the building and into the Fraser River.

The other four counts related to the company's milling process where highly toxic wood preservatives containing pentachlorophenols and tetrachloraphenols were allowed to drip from lumber into a catch basin, and eventually into the Fraser River.

Held, the accused was found guilty.

The accused could not rely on the defence that they knew the substance was poisonous and that it was entering the Fraser River, but they did not know, nor could anyone tell them, in what quantities the substance would kill fish. However, the company's actions did not amount to a deliberate attempt or a deliberate series of circumstances that caused harm to the environment. The nature of the legislation indicates that deterrence is a prime consideration in sentencing.

Fines of $18,000 were imposed - two thousand dollars in connection with count one and four thousand dollars each in connection with counts two, three, four and five.

D.R. Kier, for the Crown.
D.R. Clark, for the Accused.

VARCOE, Prov. Ct. J.

CIPA Industries Ltd. is charged under the *Fisheries Act* with five counts of depositing deleterious substance into water frequented by fish to wit: the Fraser River. The first count deals with the deposit of oil which emanated from a hydraulic machine which was used during the debarking process. The oil spill congregated on a floor, went through what appears to be a deliberately made hole in the floor, down through the building and onto the rocks of the Fraser River, hence into the river. As soon as this matter was brought to their attention, the company immediately took steps to rectify the problem so that now the situation does not exist. I have no information as to how long this situation did in fact exist but is would appear to have been there for some time. I'm also advised that it was fairly obvious and should have been easily detected by the corporate officials. I suppose the most significant mitigating feature if there is any at all, that as soon as the matter was significantly brought to their attention by the environmental authorities, they took steps immediately to have it rectified.

As an aside, one of the major arguments presented to me is that, and this was brought out by the evidence of Mr. Lanskail, that these matters should not be dealt with as criminal matters, but more of a civil nature, and that environmental authorities when they detect these matters, should dialogue with the firms concerned or the people concerned and attempt to rectify the problem before criminal or other steps are taken. I'm not sure that this was what was in the mind of parliament when they passed this legislation and imposed what is obviously a very significant fine of a maximum of fifty thousand dollars for first offence. Parliament must have felt and must have intended that corporate citizens like any other citizen, must learn to obey the law and are presumed to know the law.

However dealing with the other four counts, they arise out of the use of a very highly toxic material surrounding the substance Pentachlorophenals which is used as a preservative on the lumber to prevent discolouring and fungus, and is particularly used by firms who ship their lumber overseas by water transportation.

The process used by this firm has been described previously, but briefly the lumber was dipped into a tank, placed on a conveyor, then placed on the asphalt padding. The chemical would drip from the lumber, would eventually go into the catch-basin and then would be propelled into the Fraser River. It was estimated in evidence that approximately one cup of this substance per bundle of logs would be deposited. Needless to say, that over a period of a year this could vindicate a fairly substantial amount of this highly toxic material. We've also been advised that it takes a very minimal amount to bring about the death of fish.

We also have evidence that the Forestry Council of which this company was a party to, was in significant dialogue with the environmental authorities, because of this serious problem, to develop a form, a code of procedures to eliminate the difficult problems that exist as a result of the deposit of this material into our rivers.

It was mentioned by Mr. Lanskail that it's important that not only the important industry of lumber exists but also co-exists with the important industry of fish. These are obviously very important matters in our community and must have been understood by parliament when they passed the legislation and turned these matters into criminal acts. The legislation is really very simple, that if you place deleterious substance into water frequented by fish, you are committing a criminal act. It's quite obvious too that parliament intended by the nature of the fine, that deterrence has to be a very serious and significant aspect or part of the sentencing process.

Criminal courts understand this principle and basically it means that it must indicate to the accused corporation that this kind of behaviour is just not acceptable and also includes the concept that the penalty must indicate to others that the process of allowing deleterious substance to enter such waters is not acceptable to the people of Canada.

Now it's not easy to describe or relate these particular circumstances to the cases that have already been presented. First of all it is not the same as the circumstances outlined in the District of North Vancouver, which were obvious planned and deliberate acts of poisoning the environment. It certainly isn't the same as MacMillan Bloedel situation which was a second offence, and indicated deliberate again, a deliberate attempt or a deliberate series of circumstances that caused harm to the environment.

The circumstances that surround this particular case involve an actual manufacturing process, whereby the deleterious substance was being used as part of this process.

It's quite apparent that the corporation knew or ought to have known or must have known that this substance was dripping from the lumber and was being caught in the catch-basin and thereby entering the Fraser River. I'm also satisfied that they didn't appreciate or know, or understand the significant effect that this can have on that part of the environment. They didn't know that such a small quantity, that we learned in evidence through the experiments of the Fishery and Environmental authorities, could cause the death of fish. They knew it was toxic, they knew it was dangerous, they knew it was a poison. They knew that it was a poison that was entering the Fraser River as a result of the manufacturing process that was taking place.

So you haven't got a corporation that is culpable in the sense that of the previous cases or some of the cases that have been presented to me. That doesn't mean that they should be allowed to continue the process whereby this poison enters the river. But I do feel that the distinction between this set of circumstances and the cases that were presented by counsel, indicate a different form of behaviour and also indicates circumstances that can be regarded as mitigating the penalty. The Regina v. Cyanamid Canada Inc. case I'm satisfied doesn't really help me. This is not a case where the authorities and the corporation realizing a very serious problem were in the process of trying to solve it and in fact were spending great amounts of money and in the process found themselves before the criminal court.

If any of the cases that have been presented to me are to be considered of significance or similar. Well I'm afraid I'm not satisfied that any of them are of assistance in that regard. Probably the decision of His Honour Judge Cashman in the MacMillan Bloedel situation is of some assistance. It seems to be dealing with a similar kind of situation, the only difference being that this is not a second offence.

Keeping in mind the principles that I have enunciated and the various factors that appear to be of mitigating in aspect, I am going to impose fines on the corporation. I'm satisfied the fines should not be nominal.

As I've indicated, the parliament of Canada must by the nature of the legislation indicated to courts that deterrence has to be the prime consideration.

Accordingly I will impose fines as follows:

In connection with count one I'll impose a fine of two thousand dollars.

In connection with counts two, three, four and five, I'll impose fines of four thousand dollars on each count.

So Ordered.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. CLOVERDALE PAINT AND CHEMICALS LTD.

COLLINGWOOD, Prov. Ct. J. Surrey, November 5, 1984

Fisheries Act, R.S.C. 1970, c.F-14 as amended - accused charged with offence under section 33(2) - Depositing a deleterious substance of wood preservative, P.C.P. compound into Highland Creek - Crown charged in alternative, two counts under section 33(2) for alleged offence on March 4, 1984 - Actions of persons unknown - Due diligence defence succeeded.

The accused was charged with depositing a deleterious substance into water frequented by fish, contrary to section 33(2) of the Fisheries Act. The Crown charged in the altenative: that the accused deposited a deleterious substance in water frequented by fish; and deposited a deleterious substance in a place under conditions where such deleterious substance may enter water frequented by fish. On a "no evidence" motion held, the discharge of P.C.P. compound caused by an unknown vandal, could not be said to be the act of the accused corporation. The evidence clearly showed that no escape of the compound would have been possible without the intervention of an unknown third party bearing no association to the accused. The accused had used reasonable care; indeed, had shown due diligence in storing and maintaining the P.C.P. To hold it responsible for the actions of a vandal would be an undesirable extension of the principle enumerated in *R. v. Sault Ste. Marie*.

R. Jacobs, for the Crown.
J.E. Gouge, for the Accused.

COLLINGWOOD, Prov. Ct. J.

The corporate accused is charged with two counts under Section 33(2) of the Fisheries Act which arose from an incident on March 4, 1984 when a wood preservative, a P.C.P. compound, was discharged upon the corporations land, ultimately to find its way in to Highland Creek. The matter came before this Court on October 10, 1984 and although extensive admissions were made by the accused, a considerable amount of evidence was put forward by the Crown. At the conclusion of the Crown's case counsel for the accused, Mr. Gouge, made a no evidence motion based upon three propositions. The case was then adjourned for consideration of this motion.

I am satisfied that the motion is appropriate in so far as the first proposition is concerned, that is that the discharge of the P.C.P. compound caused by an unknown vandal cannot be said to be the act of the accused corporation. Nothing in the evidence discloses an unlawful deposit by the accused, nor with its permission of the P.C.P. compound. The evidence clearly shows that no escape of the compound would have been possible without the intervention of an unknown third party bearing no association to the accused. Instead, the evidence discloses reasonable care, indeed due diligence, on the part of the accused with respect to the storage and maintenance of the P.C.P. compound. To hold the accused responsible for the actions of a vandal engaged in the commission of a crime would be an undesireable extension of the principle enunciated in the *Sault Ste. Marie* case.

In arriving at this conclusion I have found the following cases contained in Mr. Gouge's brief of considerable assistance. The first being *Impress Wourcester Ltd.* v. *Reese*, a 1970 Queens Bench Division decision found in 1971 2 All England Reports at 357, and *Regina* v. *Byron Creek Colliers Ltd.*, a decision of County Court Judge Provensano in the Cranbrook County Court, found in 1979 8 CELR at page 31. Having decided under Mr. Gouge's first proposition that the accused need not be put to its defence on either count, I do not propose to deal with the two remaining propositions. However, by way of a gratuitous remark I find the argument arising from the case *Regina* v. *MacMillan Bloedel Ltd.*, a decision of our Court of Appeal, 1984 2 Western Weekly Reports at 699 to be intriguing and one which might well have been decided in favour of the accused. I am grateful to both counsel, Mr. Jacobs and Mr. Gouge, for their handling of the case. Charges are dismissed.

COUNTY COURT OF WESTMINSTER

R. v. CLOVERDALE PAINT AND CHEMICALS LTD.

FISHER, Co. Ct. J. New Westminster, September 13, 1985

Fisheries Act, R.S.C. 1970, c.F-14 as amended - Accused aquitted at trial of charge under section 33(2) - Depositing a deleterious substance into water frequented by fish - Crown Appeal allowed - New trial ordered - Trial Judge erred in weighing evidence on a no-evidence motion.

D.R. Kier, for the Crown.
M.A. Thomas, for the Accused.

FISHER, Co. Ct. J.

This is an appeal from the judgment of His Honour Judge Collingwood made the 5th of November 1984, whereby the Respondent, Cloverdale Paint & Chemical Limited, was acquitted on a charge against it pursuant to Section 33(2) and (5) of the Fisheries Act.

This is a Crown appeal.

The appeal is based on two grounds:

1) The learned trial judge erred in acquitting the accused on a no-evidence motion when there was some evidence on the issue upon which the accused was charged.

2) That the learned trial judge erred in weighing the evidence on a no-evidence motion.

It is my conclusion, with the greatest of respect, that the learned trial judge did in fact err in weighing evidence on a no-evidence motion, and I do find in the affirmative that there is some evidence as presented -- "some evidence" that the Respondent had committed the offence and conclude that it was therefore not open to the learned trial judge to grant an application on a no-evidence motion.

I therefore refer this matter back to the Provincial Court for a new trial.

BRITISH COLUMBIA COURT OF APPEAL

R. v. CLOVERDALE PAINT AND CHEMICALS LTD.

SEATON, J.
AIKINS, J.
McLACHLIN, J.A. Vancouver, September 9, 1986

Fisheries Act, R.S.C. 1970, c.F-14 as amended - Accused acquitted at trial of charge under section 33(2) - Depositing a deleterious substance into water frequented by fish - Crown appeal to County Court allowed - Accused appealing decision to allow a new trial - Spawning ground closed to fishing can be "waters frequented by fish" -Intervention by third party a "condition contemplated by offence of permitting deposit of deleterious substance in any place "under any conditions" where substance may enter water.

The accused was charged with violating section 33(2) of the Fisheries Act, R.S.C. 1970, c.F-14 as amended. The Judge at trial, on a motion by the accused, dismissed the charges on the ground that there was no evidence that the deposit had been made into "water frequented by fish" or that the defendent permitted the deposit. On appeal by the Crown, the appeal was allowed and a new trial ordered. The defendent sought leave to appeal the decision of the County Court.

Held - Leave to appeal was granted; the appeal was dismissed.

There was evidence that the waters were "frequented by fish" as there was evidence that dead fish resulted from the spill and that fishing was prohibited in the area because it was a salmon spawning ground.

There was also evidence that the defendent permitted the deposit. The defendent's argument that it could not be guilty of permitting the deposit where, as here, a third person opened the valves on the tank, was rejected. Intervention by a third party was a "condition" included in the statutory prohibition against a deposit in any place "under any conditions" where the substance may enter water frequented by fish.

Ordering a new trial rather than a continuation of the original trial from the point of interruption did not deprive the defendent of his right to a fair trial under section 11(d) of the Charter as 2 years had elapsed since the original trial and it was doubtful that the trial Judge would recall much about the case.

D.R. Kier, Q.C. and
J. Cliffe, for the (Crown) Respondent.
J.E. Gouge, for the (Accused) Appellant.

(On appeal from acquittal, being a Summary Conviction Appeal) from the decision of Fisher, C.C.J.)

SEATON, J.

The appellant was charged under s.33(2) of the Fisheries Act. That subsection provides:

> "(2) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water."

At the conclusion of the Crown's case the charges were dismissed following a motion by the appellant that there was no evidence. The Crown appealed.

The Honourable Judge Fisher, of the County Court of Westminster, allowed the appeal. He said:

> "It is my conclusion, with the greatest of respect that the learned trial judge did in fact err in weighing evidence on a no-evidence motion, and I do find in the affirmative that there is some evidence as presented -- "some evidence" that the Respondent had committed the offence and conclude that it was therefore not open to the learned trial judge to grant an application on a no-evidence motion."

The appellant makes two submissions before us. The first is that there was no evidence that these were waters frequented by fish as that term is used in the Fisheries Act.

The qualification arises out of the fact that this legislation is limited by s.91(12) of the Constitution Act to Fisheries. This court in R. v. MacMillan and Bloedel Limited 1984 2 W.W.R. 669, has explained that limitation. The statute must be read as limited to matters within the jurisdiction of Parliament.

There was evidence that this spill caused dead fish to float around. There was also evidence that the area is one in which fishing is prohibited. It is prohibited because this is a spawning ground where juvenile salmon are raised. In my view there was evidence on this point and the County Court judge was correct to say that it was inappropriate to dispose of that point on a no-evidence motion.

The second argument was that the appellant did not permit the deposit or deposit of (sic) the substance in a place under conditions where it might enter waters frequented by fish.

The foundation of that argument is the statement that the appellant could never be guilty of this offence where another person has intervened. The evidence in this case indicates that a third person opened the valves on a tank. The appellant says it follows that the appellant cannot be found in breach of this section.

In my view the question raised by this section is: Did the appellant deposit a substance in a place under conditions where the substance may enter the water? The key word there is "conditions". Counsel for the appellant argues that "conditions" cannot include the possible intervention of a third person. I see no reason to limit the language in that fashion. The statue says "any conditions". In my view "any conditions" would include the possibility of a third person intervening.

The question as I posed it is essentially a question of fact. I agree with the Honourable Judge Fisher that there was evidence on that question.

There is a third point raised in the event that we concluded that the County Court judge was right to say that the no-evidence motion should not have been granted. The argument is that instead of ordering a new trial the County Court judge ought to have ordered that the trial continue from the point at which it was interrupted; that is, that the Crown's case is closed and now the defence can elect to call evidence or not to call evidence and conclude the case. It is said by the appellant that to order a new trial is contrary under the Charter provision 11(d) demanding that a fair trial be held.

I am not persuaded that a new trial not mean a fair trial. There is nothing here to suggest that the appellant cannot have a fair trial starting afresh and I doubt that a fair trial could be conducted by the judge who completed his work in this matter nearly two years ago when he granted the no-evidence motion. I doubt that he could recall much, if anything, about the case. I would not give effect to the argument that the matter must go back for continuation of the trial that was terminated by the no-evidence motion about two years ago.

Under these circumstances I would grant leave, but would dismiss the appeal.

ATKINS, J.A.:

I agree.

McLACHLIN, J.A.:

I agree. I would add only a few comments on the last point, namely, the contention of the appellant that it would be unfair to Cloverdale Paint to permit the Crown to begin again with the advantage of knowing in advance the strategy of the defence in the new trial. This question has been of some concern to me. However, the possibility of a new trial must have been in counsel's mind at the time of the application for a no-evidence motion for dismissal. Assuming that that motion was successful and an appeal were brought from that, the possibilityof a new trial certainly existed. In many circumstances it would seem to me not feasible to proceed with a new trial after the expiry of all appeals on a no-evidence motion. In others, as my brother Mr. Justice Seaton has indicated, it might be unfair. In my opinion, to lay down a rule that to order a new trial in circumstances such as this is unconstitutional would go too far on the material before us and I cannot say that the County Court judge erred in making the order he did.

SEATON, J.A.:

The appeal is dismissed.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. CLOVERDALE PAINT AND CHEMICALS LTD.

CAMPBELL, Prov. Ct. J. Surrey, May 12, 1987

***Fisheries Act*, R.S.C. 1970, c.F-14 as amended - Accused charged with offence under section 33(2) - Depositing a deleterious substance of wood preservative, P.C.P. compound into Highland Creek - Crown charged in alternative, two counts under section 33(2) for alleged offence on March 4, 1984 - Actions of persons unknown - Due diligence defence unsuccessful - Fine of $10,000 levied.**

The accused was charged with depositing a deleterious substance into water frequented by fish, contrary to section 33(2) of the Fisheries Act. In the alternative the accused was charged with depositing a deleterious substance in water frequented by fish and depositing a deleterious substance in a place under conditions where such deleterious substance may enter water frequented by fish.

The company maintained two large storage tanks on its property, containing chlorophenic, a wood preservative and toxic substance. In the early morning of March 4, 1984, persons unknown gained access to the tanks and opened the valves on the tanks permitting the toxic substance to escape. The substance found its way off the premises into a ditch, into a culvert leading to the Highland Creek. As a result numerous fish, approximately one thousand, were killed by the toxic substance.

The accused company admitted that the toxic substances were normally kept inside the building or underground. Further, it was admitted that no ditches were dug around the tanks, since the solution was to be there only temporarily. There was a chainlink fence plus barbed wire on top around the fenced area of the company and a gate that was kept closed at night; however, at the time in question there appears to have been a hole under the fence near the railway spur. The hole had once been filled in with a series of railway spikes but they had been removed about a month prior to the spill.

Held, the Court found the accused guilty on count one and not guilty on count two.

The Court rejected the defence of due diligence holding that the accused company had not used reasonable care in ensuring that the valves had not been locked and in not filling the hole under the fence. Further evidence of unreasonable care was the absence of ditches to take care of any spill that may have occurred either accidently or deliberately. The company failed to prevent an occurrence which it ought to have foreseen.

The Court fined the company $10,000 based primarily on the *City of Quesnel case* and the factors and principles enunciated therein. Specifically the court considered it relevant that the accused had no previous record, that the act involved was an act of a vandal and that the accused took immediate steps to rectify the situation.

R. Jacobs, for the Crown.
J. Gouge, for the Accused.

CAMPBELL, Prov. Ct. J.

All right, Now, I'll go into my judgment concerning Cloverdale Paint Incorporated, as it's now know, Cloverdale Paint Inc. Which company faces two charges under the *Fisheries Act*, Section 33(2) of unlawfully depositing or permitting to deposit a deleterious substance, wood preservative, in a place under conditions where such deleterious may enter water frequented by fish and thereby committing such an offence. There are two charges and I believe counsel have agreed they are more or less in the alternative and I'll cover that near the end of my judgment.

A summary of the facts which I've obtained from any notes on evidence. I must apologize. I don't have a formal typewritten judgment all well prepared. I will be jumping from notes made on evidence to notes made on the cases and finally my own reasons, so if you'll bear with me I'll go through them.

The facts would appear to be, on or about the 4th of March, 1984, the defendant company operated a business on King George Highway in Surrey, British Columbia. The company maintained two large storage tanks on its property. These storage tanks contained penta and tetra chlorophene solutions, also know as chlorophenic, which is a wood preservative, which in turn is a toxic substance and which is agreed to be a deleterious substance insofar as the *Fisheries Act* is concerned. One tank contained approximately ten thousand gallons of this toxic substance and the other approximately three thousand gallons. As to security of the premises, the company had erected a chainlink fence around the area with a barbed wire on top, plus a gate which was closed at night. The property was also protected by an outdoor lamp at night, a flood light system. There were ditches outside the premises running parallel with a railway spur and these ditches went into a culvert under the railway and then into Highland Creek which is mentioned in the charge.

The photographs, numerous photographs have been presented to the court. They show the premises in question. The two tanks in question, side by side. It shows a grassy area below these tanks and the one picture showing the railway spur would indicate a gentle slope of the lane from the premises downwards to the culvert. The tanks are shown with their valves displayed, easily accessible, approximately shoulder height and no form of locking devices on these valves. The gate in question, part of the chainlink fence and crossing the railway spur is shown with a form of opening or accessibility under the particular gate. That's the situation of the gate at the time this spill took place which is on or about the 4th of March. There are differenty types of valves on both tanks as the photographs can show, but it's quite obvious there are no locks on the valves when these photographs were taken, which I understand to be the day in question.

In the early morning of the 4th of March, 1984, some person or persons unknown got into these premises and opened the valves on these two tanks. The toxic fluid found its way off the premises, into the ditch, into the culvert and into the Highland Creek and from there into waters frequented by fish. As a result, numerous fish, approximately a thousand, were killed by this toxic substance.

Two fisheries officers were called in that same morning to investigate the polluted stream. They followed the ditches containing the milky white substance from the culvert upwards to the defendant's premises, approximately 200 yards in distance. The gate in the chainlink fence was closed but they were able to crawl under the fence near the railway spur, and I've already mentioned that the photographs do show such an opening. The two officers go into the fenced compound and observed the two tanks, already mentioned. The tank valves were opened and the grassy area below the tanks was milky white and this same liquid, milky white liquid, drained into the ditches outside the fenced area.

Those essentially are the facts as to what happened.

Evidence by the Crown consisted of expert evidence on pollution and environment plus a document, Exhibit 6, which purported to be a series of recommendations on safe storage of toxic materials. It appears that between 1977 and 1980 there were various studies and conferences on the same storage of toxic substances of concern to the forestry industry and the general public. It would appear also that representatives of the defendant company had attended some of these meetings and particularly the one in November of 1983. As a result, this Code or Exhibit 6 was produced in February of '84, just prior to the spill in this particular case.

The Crown called two employees of the defendant company. The toxic liquid in the tank had been returned from a customer back in the spring of 1983. The company was aware of its toxic contents. The company considered the liquid was there only temporarily until disposed of or sold. The company confirmed its security, consisting of a chainlink fence and barbed wire and a gate which was closed at night, plus a floodlight system. The company checked the valves regulatory for any leakage but no locks were placed on these valves. The company did not construct any ditches around the tanks in the event of a spill. The company admitted that toxic substances were normally kept inside the building or underground. The company did have underground tanks with a lock and key system containing other solutions or chemical solution and did have a key system to prevent the misuse of its contents by mistake and the company had discussed placing locks on the valves. That short summary of evidence comes from the two employees of the defendant company called by the Crown.

The defence called the President of the company who admitted to knowledge of the two tanks in question on the premises and said that one contained a PCP solution returned by a customer. The President was aware of the potential danger to the environment and the health hazard of this particular substance. He admits attending the conference in November of 1983 and he confirmed the security provisions already mentioned. He is now aware of the hole under the fence having seen it the day of the spill. He attended the scene when called upon. He admits no ditches were dug around the tanks, since the solution was there only temporarily. When I say temporarily, I do not that the tanks had been there for almost -- from spring of '83 to March of '84, which is quite some time. The President of the company believes a vandal got in somehow and opened the valves and that it was not a disgruntled employee or customer. Even as of today, the person is still unknown and how he got in is still unknown.

Now, the question of liability of the company for the spill on the 4th of March, 1984.

The Crown argues that the defendant company should at least have installed locking devices on the valves on the two tanks. That ditches should have been constructed around the tanks in the event of a spill. That some sign as to contents be placed -- or should have been placed on the tanks to discourage anyone from opening valves. In other words, the argument consists of more or less the recommendations contained in Exhibit 6 which was the Code put out after the conference in '83.

The defence places the blame on vandalism which the company could not anticipate and further says that the premises were closed in by a fence, a gate and that the valves had been checked regularly for leaks and tightly closed even though not locked.

I think counsel agree that liability in this case is one of strict liability under the *Sault St. Marie* case and that's one of the cases submitted to me, plus others. I'll go through these cases briefly since they were referred to me by way of argument and submission.

In the *Sault St. Marie* case which comes from the Supreme Court of Canada, a new trial was ordered because the defence of due diligence was not argued at the original trial. In that case the City of Sault St. Marie contracted with a company for disposal of garbage and it was the manner of disposal that resulted in water pollution. The Supreme Court said;

> "The defence of due diligence is open to an accused to avoid liability by proving that he took all reasonable care."
>
> And secondly;
>
> "Did the accused fail to prevent an occurrence which it ought to have foreseen."

Defence counsel submitted the *Byron* case, *Regina* v. *Byron Creek*. Citations for all these can be obtained if necessary. They'll be with the file. The *Byron* Creek case was September of 1978, where there was no liability because there was a pollution case. The defendant had taken all reasonable care. The insallation of overflow pipes, construction of ditches and ponds and spent some four hundred thousand dollars to prevent polluting any local streams, but this was more or less an act of God in that there was a very heavy rain. There was a flooding and there was pollution, but no liability. This is not similar to the case which I have before me which involves vandalism.

There was the *Placer Mining* case (editor: Placer Development Ltd.) from the Yukon Court in December of '83. This was a pollution charge and a conviction was entered. There was a spill of diesel fuel into the waters which led into waters frequented by fish. This was caused by a leak from the accused's fuel system and it appears that over the winter months an unlocked valve was left exposed and as a result, there was this overflow of diesel fuel and causing pollution. Again, this is more or less negligence on the part of the Placer Mining Company and again no vandalism, but there was a conviction for leaving a valve opened. In that case comes a reference to law as to the standard of care required.

> "The case warranted and each case is governed by the gravity of potential harm, the likelihood of harm and the reasonable alternatives and the degree of skills expected."

The Heatley case was referred to me but more or less, I agree with defence counsel, more or less of a civil nature and I'm not referring to it.

There is a *Gulf of Georgia* case from our own B.C. Court of Appeal in February of 1979. This was again a charge under S. 33(2) of the *Fisheries Act* and the facts briefly refer to a fuel barge which was pumping fueld oil into storage tanks and there was an overflow of this particular substance due to an open valve. Again, a case where the defendant company was liable for not doing something it should have done or ought to have foreseen and did not take reasonable care. I do note in that case, which is from our own Court of Appeal, at page 137 they say;

> "Due diligence might include locking devices for valves. That the defendant did not make adequate provisions in its system to prevent a spill caused by a valve being opened that should not have been opened."

The Court goes further in the Gulf of Georgia case.

> "Reasonable precautions includes close scrutiny of valves while in use, or failing such scrutiny, some other method of ensuring that the valves in question would be closed and remain closed."

Again, the defence was one of due diligence.

Now, the next and perhaps the last case I wish to refer to is the *City of Quesnel* case, *Regina* v. *City of Quesnel*, decided in January of this year by County Court Judge Perry. Again a charge under S. 33(2) of the *Fisheries Act* involving pollution to waters frequented by fish. Now, this is a case which does involve vandalism as compared with the other cases which are more or less negligent acts on the part of the defendant company. In the *Quesnel* case, the city's only sewage treatment plant near the waters of Baker Creek which flowed into the Fraser River. In the *Quesnel* case there was a chainlink fence around the plant and barbed wire on top of that fence. This was the only security measure that prevailed. A large concrete chlorine tank was inside a building but the door to that building was unlocked. It appeared in that case that a vandal somehow got in, over the fence or under, but the vandal did get in and did open the door to the room containing the tank, opened the valve and more chlorine got into the sewage treatment and as a result, pollution occurred, with the resultant killing of many fish in the Baker Creek.

So, of all the cases submitted to me, the only one which is really perhaps on point or even close to all fours is the *Quesnel* case where a vandal was the direct cause of the pollution. If there was liability, and there apparently was in the *Quesnel* case because the door to the chlorine room was unlocked and there's even a strong argument for liability in this case where the two tanks are simply out in an open area and not in any building.

So, I've gone through the cases and referred to them. Now, I get down to this case, whether there's liability or not. Let's go into security first. Was it sufficient?

There was a chainlink fence plus barbed wire on top around the fenced area of Cloverdale Paint Company. There was a gate which was closed at night, that is good security, but at the time in question there appears to have been a hole under the fence near the railway spur. This hole had been filled in at one time with a series of spikes but at the request of the railway company, these spikes were removed approximately one month prior to the spill. In my opinion, the company should have taken some immediate steps to fill in the hole. I do note, according to the photographs, that there has been something put in to fill that hole. Whether the vandals in the Cloverdale Paint got -- how they got in is not known. Whether they climbed over or got under is not material, but they did get in, but the fact that there was an open area available to a vandal, I think should be considered.

Security at the Cloverdale Paint consisted of floodlamping at night. This can be considered as a deterrent to anyone prowling or snooping in the area, in other words, vandals.

Valves on the tanks -- now, that's the third point I wish to come to. The evidence is clear that they were not locked but merely closed tightly. In the *Gulf of George* case, the Court of Appeal, I refer to them again where they say;

"...due diligence might include locking devices for valves."

We have, on the premises of the defendant company, two large tanks containing a toxic substance and it's my opinion that even during open business hours there was a possibility of accidental or deliberate opening of these valves by an employee or customer. The possibility is there, but even at night, considering the *Quesnel* case, if a vandal gets into the premises there would seem to be the possibility certainly of damage being done.

In my view, the company should have considered and installed locking devices on the valves of these two tanks. The tanks had been there for almost a year in an unlocked position, not just a short three or four or a week temporary storage. They had been there long enough. According to the evidence, the defendant company was well aware of the tanks and actually it was a problem for them as to what to do with it. They often discussed them in meetings. So, they were well aware of the situation.

The fourth point is dangerous to the environment. There has been and was at the time considerable publicity and study on the effect of toxic substance on the environment, that is, the dangers of pollution. Here is a company, the Cloverdale Paint Company, whose business involves the making and storage of toxic substances, that is wood preservatives. In my view, they are bound to know the dangers that could happen if such substances were accidentally or deliberately released on their property.

In order to consider liability, one merely has to stand -- or at least put himself standing in the fenced compound of the defendant premises, looking at the two large tanks, the simple unlocked valve controlling the flow of that toxic substance, the slope of the land in question and ask the question, where would the material flow if the valves were accidentally or deliberately opened.

There were no ditches or excavations to prevent a spill from leaving the premises.

I again refer to the *Quesnel* case as being the only case, really, which covers vandalism as a cause of pollution. I was rather surprised to read the decision. It seems to extend strict liability to cover acts of vandalism and the obvious question is how can one anticipate acts of vandalism, whether it's a chainlink fence closed by a gate, barbed wire on top. If the vandal wants to get in by climbing over or under or cutting through, that's possible. Even if the doors are locked and there are locks on valves, the vandal can deliberately damage such items and yet the *Quesnel* case seems, and in my view, covers such vandalism.

I feel I am bound by the *Quesnel* case which does impose liability for an act of a vandal. Simply in the *Quesnel* case because the door to the chlorine tank contained in a building was unlocked and as I mentioned earlier, if that's liability, then certainly two storage tanks in an open area with unlocked valves would also incur liability.

I find the defendant company did not use reasonable care in not ensuring that the valves were locked. In not filling the hole under the fence, which has been mentioned. In not providing ditches on their property to take care of any spill that may have occurred either accidentally or deliberately. In summary, I find the company failed to prevent an occurrence which it ought to have foreseen.

I find the company guilty on count number 1. In view of counsels' agreement that they are in the alternative and particularly in view of the *Kineapple* principle, I make a finding of not guilty on count 2.

SENTENCING

. . .

MR. KIER:

All right. Well, the *Quesnel* case, there's a fine. Your Honour has that. A fine of five thousand dollars. Now, that was in -- as spills go. As spills go, Your Honour, this case is the worst that I'm aware of in ninteen and a half years of prosecuting these cases. The absolute worst, because of the nature of it. There's ten thousand gallons at least that spilled out into the environment. It killed all the way down to the ocean at Mud Bay. In fact, crab fishing was closed at Mud Bay. Now, since that time I'm told that the creek has rehabilitated itself because of the many tributaries to Highland Creek so that the fresh water trout have come back in it and in addition, the salmon have come back because they're a cyclical thing. They won't know for sure because the three or four year cycle is not completed yet as far as salmon are concerned, but as far as trout, they're coming back because of these tributaries. But nevertheless, Your Honour, it is the most serious case that I am aware of. The fines have gone as high -- I can give Your Honour firsthand experience. I don't have the case here. Canadian Forest Products, I believe around 1981, '82 or '83, in that area, there was six counts of pollution, relatively minor but of a toxic, caustic soda in a small creek which went into the river up near Port Melon and there was six counts of twenty thousand dollars a count.

After that, Your Honour may have heard of the *Jack Cewe* case and that was some 10 or 11 counts. There was total fines of a hundred and fifty thousand dollars and Judge Oppal, in County Court, applied I believe the *Kineapple* principle and cut down a couple of the convictions and I think the fines probably end up around a hundred thousand dollars on about say eight to ten counts.

Now, there's one count here but that, in my submission, Your Honour, this calls for a very close to the maximum fine of fifty thousand dollars to act as a deterrent to other people who store toxic chemicals on their premises and take little or no precaution to make certain that a spill cannot occur. Now, the corporation may very well have spent two hundred thousand dollars cleaning up this, but that is another matter entirely. This is a matter of deterrence to people that Your Honour has to concern to protect the environment and the Crown is submitting that Your Honour should impose a penalty that is very close to the maximum so to bring home to the people who deal with chemicals that very careful supervision is required. That a similar spill will not occur. As I said, Your Honour, I have done these cases for a considerable period of time and this is the worst that I've ever seen.

CAMPBELL, Prov. Ct. J.

Well, when you say worst, you're looking at the results of the pollution.

MR. KIER:

I'm looking at the result but ten, twelve, fourteen thousand gallons of something like one drop in a bucket of water will kill fish, this is massive. Absolutely massive for the environment. Now, fortunately, we have small tributaries but I say that is the most glaring factor. That this is akin to having dynamite on your own premises because of its toxicity. That's what I'm saying. That's why Your Honour should reflect in your sentence that it's a very serious matter and of course the more serious, as Your Honour has seen in the cases, that you have to have more protection and this was not done. The deterrent fact, in my submission, is one Your Honour should pay the most attention to.

CAMPBELL, Prov. Ct. J.

All right. So, you're not seeking an adjournment for the matter of sentence. You're just --

MR. KIER:

No. I'm prepared -- if Your Honour -- you know, if Your Honour --

CAMPBELL, Prov. Ct. J.

All right. I'm inclined to go ahead.

MR. KIER:

-- is prepared to accept my submission. Those are the cases I've been involved with, that I know. I wasn't on the *Cewe* case but I have read the Reasons a number of times. I was on the *Canadian Forest Products* case in the early 1980's and I know that was Judge Johnson up there and the *Quesnel* case here of five thousand dollars on count 1 and fifteen hundred on count 2, --

CAMPBELL, Prov. Ct. J.

Yes. I have it in front of me.

MR. KIER:

-- and that's an indication where that would not be in the -- would only be a pittance as to what occurred before Your Honour. What the facts before Your Honour are. That this *Quesnel* case is an example of the low end. The maximum fine being fifty thousand dollars for a first offence.

CAMPBELL, Prov. Ct. J.

I notice in the *Quesnel* case -- I'm just reading His Honour Judge Perry's decision, there is what. Certainly there was 200 fish killed and as soon as possible the matter was rectified. So, maybe that went to mitigation.

MR. KIER:

Yes. Well, all the circumstances would be taken into consideration, Your Honour, yes.

CAMPBELL, Prov. Ct. J.

All right, Go ahead, Mr. Gouge.

MR. GOUGE:

First, Your Honour, as to my learned friend's observation that this stuff was dynamite and one drop in a bucket of water would kill fish, that observation, Your Honour, applies to the concentrated substance, not to the dilute solution which the accused had in its possession. So, if it is dynamite, it is somewhat dilute dynamite.

Secondly, as to my learned friend's observation that this is the worst spill in his experience, Your Honour knows something of the order of a thousand fish were killed on the day of the spill. There is no evidence and as far as I know, Your Honour, no indication of any long term or permanent damage to the fishery in the waters in question. Now, on that day a lot of fish died but there is no evidence -- and I do not understand it to be true, that there has been any long term damage to the environment, which is a point of some significance.

When one talks about 200 fish in the *Quesnel* case and 1000 fish at the case at bar, one ought to have in mind, in my submission, that we're talking orders of magnitude. I don't imagine there were exactly 200 fish in the *Quesnel* case or exactly 1000 fish in the case at bar. They seem to be spills of similar order of magnitude.

As to the toxicity of the substance, chlorine is notoriously toxic, Your Honour. The horrors of the first World War will bring that to everyone's mind. Pentachloriphenol is, of course, a very toxic substance. It is, in my submission, no more so that chlorine, nor is there any information from which Your Honour can conclude that it is anymore toxic.

The most profound similiarity between the *Quesnel* case and the case at bar is the one identified by Your Honour in your Reasons for Judgment. They are the only two cases in which the act was an act of a vandal.

In considering the matter of sentence, in my submission, Your Honour should consider that Cloverdale Paint was, in a sense, blameless in this matter. Your Honour has found them to be guilty of a want of care, but this is not a case of an accused who deliberately dumps a substance in water. It is not a case of an accused, where the act of negligence of the accused's employees have brought it about. For example, by failing to maintain a valve or something of that kind. It is a case where the accused is a victim of an irresponsible vandal and that, in my submission, must have been a point which weighed heavily with His Honour Judge Perry.

When I describe the accused as a victim, I should equate Your Honour with that which transpired after the spill.

The spill was discovered, as Your Honour knows, on the morning of Sunday, March 4, 1984. Personnel from Cloverdale Paint were on the scene that Sunday, together with representatives of the Waste Management Branch of the Province, the Federal Fisheries Department of the Provincial Fish and Wildlife Branch. A meeting took place at the site on that day and it was decided that the Waste Management Branch of the Province of British Columbia would have primary authority for directing the clean up operation. That government organization has statutory authority to direct clean up measures in writing. Such directions must come in writing from the Director of the Waste Management Branch before they are enforceable. Cloverdale Paint did not wait for instructions from the Director of the Waste Management Branch. They did not stand on their legal right to leave it up to the Waste Management Branch to solve the problem. Beginning on Sunday, March 4 and continuing for a period of six months thereafter, Cloverdale Paint voluntarily complied with each and every request and direction of every government organization that had anything to do with this spill. That cost Cloverdale Paint in excess of two hundred twenty-five thousand dollars. Ultimately, Cloverdale Paint recovered a large part of that from its insurers, but it is net, out of pocket, in excess of fifty thousand dollars as of today as a result of the act of this vandal.

So, when I describe Cloverdale Paint as a victim, Your Honour, it would be true to say that Cloverdale Paint has been very seriously effected by this act.

My learned friend referred to the factor of deterrence, Your Honour, and indicated that in his view a penalty of fifty thousand dollars would be an adequate deterrent. Cloverdale Paint has already paid that penalty, Your Honour.

Finally, my learned friend indicated that the maximum penalty, as he construed the statute, is fifty thousand dollars. That is, as I understand it, true of the statute as it is today. The statue at the time of the offence in question, as I recall, provided a maximum penalty of twenty thousand dollars.

MR. KIER:

Well, that's not correct, Your Honour. It's been fifty thousand for some time. I don't have the statute section here, but it's --

CAMPBELL, Prov. Ct. J.

As of 1984?

MR. KIER:

Oh, yes. It hasn't changed.

CAMPBELL, Prov. Ct. J.

Three years ago.

MR. KIER:

At least since 1981.

CAMPBELL, Prov. Ct. J.

Well, now just confirm this. Let's just check the Quesnel case where His Honour Judge Perry does set out the penalty section.

MR. KIER:

That's at page 8, Your Honour.

CAMPBELL, Prov. Ct. J.

yes, and then the offence in the -- it was August of 1985 that Quesnel faced the charges. So, it would appear for offences in 1985, as determined by Judge Perry in 1987, that's just January of this year, he does apply the maximum penalty of fifty thousand.

MR. KIER:

Your Honour, as I recall, it was 1981 or so that it was changed to fifty thousand dollars. It's been like that for some considerable period of time. Not close to 1984.

MR. GOUGE:

It's my fault for not having --

MR. KIER:

If there was any doubt I would adjourn, Your Honour, but there's not doubt in my mind that it's fifty thousand at the time.

CAMPBELL, Prov. Ct. J.

Well, the Quesnel case would seem to indicate that was in effect, certainly in August of 1985, because that's the offence he dealt with.

MR. GOUGE:

My learned friend ought to know, Your Honour. If there's any difficulties, surely we can return. I'll accept my learned friend's assurance.

So, as Your Honour has indicated, the most similar case is the *Quesnel* judgment in which a fine of five thousand dollars was imposed. In my submission, Your Honour, the spill in the *Quesnel* case was similar in its consequences to the environment to the spill in issue before Your Honour. The City of Quesnel could not possibly have behaved more responsibly than the accused who is before Your Honour, because no one could have. In the *Quesnel* case there was absent the factor which is before Your Honour, which is that the accused was exposed to an initial outlay in excess of two hundred twenty-five thousand dollars and has been, in the long term, a net loser to the extent of more than fifty thousand dollars already as a result of this consequence.

In those circumstances, Your Honour, in my submission, the appropriate fine is something similar to that levied in the Quesnel case.

Thank you, Your Honour.

CAMPBELL, Prov. Ct. J.

All right. Thank you. Yes, I don't see any need to adjourn for the matter of sentence. I have submissions from both counsel and I do have the *City of Quesnel* case in front of me in which His Honour Judge Perry goes into the matter of sentence very thoroughly. He refers to the penalty section and for a first offence a maximum fine of fifty thousand dollars. On page 8 he says that Parliament regards the pollution matter as a serious matter and that's why the fines have been increased over the last few years. In the *Quesnel* case the city had no previous record and I have a similar situation here involving the Cloverdale Paint Company. On page 10 the judge refers to the city's act as not being a wilful act but an act of carelessness. In other words, an act of a vandal. That's similar with the Cloverdale Paint. Steps were taken almost immediately to rectify the situation and I find that's similar to the case involving Cloverdale Paint. The other cases involving fines and convictions were based on pretty well negligent acts of the defendant in doing something wrong. Here's a case where the defendant ought to have done something but didn't and is a case involving vandalism.

In my view, the maximum fine should not be imposed, particularly with no record. There are attempts to remedy the situation and blame certainly being placed on a vandal, person or persons unknown.

I'm setting a fine of ten thousand dollars and in default distress.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. COMPAC CONSTRUCTION LTD. et al.

LAYTON, Prov. Ct. J. February 21, 1983

***Fisheries Act*, R.S.C. 1970, c.F-14, as amended - Offence under section 33(2) - Depositing a deleterious substance into water frequented by fish - Hog fuel leachate onto Mountain Highway, from there, contaminated water ran into Hastings Creek - Consideration of defence of due diligence - Both accused convicted and each fined $5,500.**

The accused was charged with the violation of section 33(2) of the *Fisheries Act*, R.S.C. 1970, c.F-14 as ammended.

The accused was preparing to build an apartment building on land owned by the co-accused Marbar Holdings Ltd. It was necessary to drain two large excavations which were contaminated by hog fuel leachate, a substance that could be toxic to fish. The accused were advised by one government official that the contaminated water could not be discharged to the sanitary sewer system but could be discharged to the storm sewer system. A second official however said that the discharge could not be to Hastings Creek, or to the storm sewer system and would have warned the accused if they had advised her of this possibility. The accused pumped out the excavations onto Mountain Highway and from there the contaminated water ran into Hastings Creek.

Held, both accused are guilty and are each fined $5,500.

The accused caused a substantial quantity of polluted water which was deleterious to fish to flow into Hastings Creek, a water frequented by fish. Clearly due diligence was not exercised.

D.R. Kier, Q.C., for the Crown.
T.J. Corbett, for the Accused.

LAYTON, Prov. Ct.

Compac Construction Ltd. and Marbar Holdings Ltd. are charged

"That on or about May 21, 1981, at or near the District of North Vancouver, British Columbia, they did unlawfully deposit or permit the deposit of a deleterious substance in water frequented by fish or in a place under conditions where such deleterious substance may enter water frequented by fish in violation of Section 33(2) of the Fisheries Act."

I will say at the outset that I find each defendant guilty of this charge.

My reasons for so doing are as follows:

1. Marbar Holdings Ltd. was at the time of this offence the registered owner of Lot B of Lot 5, Block 6, District Lot 2023, Plan 5451 in the District of North Vancouver. This is a large lot facing onto Mountain Highway and about one block north of the intersection of Mountain Highway and Lynn Valley Road.

2. Exhibit 4 is a survey plan prepared by the witness, Terrence Jones on May 11th, 1982. It shows that Hastings Creek flows south along the western boundary of the lot and that Mountain Highway forms the eastern boundary of the lot.

   The witness, Susan Latimer, described Hastings Creek as then curving east a short distance from the southern boundaries of Lot B and thence under Mountain Highway. Hastings Creek is a tributary of Lynn Creek which in turn flows into Burrard Inlet. The creek passes under Mountain Highway about one block south of Lot B.

3. According to the plan, Exhibit 4, and to testimony there is a storm sewer catch basin on the west side of Mountain Highway about 100 metres south of Lot B. This sewer, I find, empties into Hastings Creek where it crosses the highway some 100 metres further down the highway.

4. Compac Construction Ltd. was preparing to build an apartment on Lot B. It first had to drain two large excavations which are shown in the photographs, Exhibit 6. The photograph also show piles of hog fuel then present and scattered on Lot B.

5. On April 29th, 1981, Susan Latimer, a habitat protection officer with the Fish and Wildlife Management Department of the Ministry of the Environment, visited Lot B. She became concerned that these water-filled excavations or ponds were contaminated by hot fuel leachate. One excavation had she believed been made into an area earlier agreed to as protection for Hastings Creek and thus could begin to drain directly into the creek. She knew from her professional experience that hog fuel leachate could be toxic to fish.

6. Between May 3rd and May 6th, 1981, she contacted Mr. Kingsley Low, the project architect, who told her to contact Mr. Douglas Shaw. She spoke by telephone to Mr. Shaw between the 3rd and 6th of May 1981 and expressed her concern.

7. Mr. Douglas Shaw, then president of both defendant companies, admits to speaking by phone to Susan Latimer. He contends that she warned him only about pumping the ponds into Hastings Creek. He testified that he told her he had permission from the District of North Vancouver Engineering Department to pump into the storm sewer system but was denied permission to pump into the sanitary sewer system. He testified further that she did not warn him not to pump into the storm sewer system.

8. I am satisfied and find that Mr. Shaw was made aware in this telephone conversation;

   (a) that Susan Latimer was an officer with the Fish and Wild Life Management Department of the Ministry of the Environment;

   (b) that the water on his companies' property was probably contaminated by leachate and dangerous to fish;

(c) that it should not be allowed to escape or be pumped into Hastings Creek or other water frequented by fish, and

(d) that if he had told Susan Latimer that his company intended to pump into the storm sewers, she would have warned him that this was not acceptable as the storm sewers in the area emptied generally into the local streams forming the watershed.

9. On May 21st, 1981 at about 10:30 a.m., Susan Latimer and Douglas Adolph, a conservation officer, in response to a complaint, visited Hastings Creek at the Mountain Highway storm sewer outfall. They found the creek below the outfall was black and foaming. Douglas Adolph walked up to Lot B and found that the ponds were being pumped out onto Mountain Highway. The liquid was running down Mountain Highway and into the catch basin shown on Exhibit 4. Photographs entered as Exhibit 6 were taken. Samples of the liquid from each of the ponds and from the outfall were taken and delivered to Ron Watts of Environment Canada.

10. I am satisfied from the evidence of Susan Latimer, Douglas Adolph and from John Christiansen, project manager for Compac Construction Ltd., that the two ponds were substantially pumped out onto Mountain Highway. From there the liquid ran down Mountain Highway into the catch basin and on into Hastings Creek. If I recall, John Christiansen testified that the pumping took two days.

11. Ron Watts conducted tests to determine whether the sample collected by Susan Latimer were toxic to fish. They had come from the sewer outfall, Site 1, the front pond closest to Mountain Highway, Site 2, and the pond at the rear of Lot B, Site 3.

12. I am satisified that Ron Watts is an experienced fisheries technician, professionally qualified to conduct these tests and to interpret the results for this court. He testified that each of the three samples was toxic to fish, that all fish in each test showed symptons of stress, that some fish died in the sample from Site 1 and that all fish died within five minutes from the sample from Site 3.

Mr. Watts was thoroughly cross-examined. He remained firm in his conclusion and his testing technique was not, I believe, shown to be inappropriate as was the case in both *R. v. Great Canadian Oil Sands Limited*, a decison of the Alberta District Court on January 10, 1978 and *R. v. British Columbia Forest Product Ltd.* a decision of our County Court, on June 17th, 1976.

13. Susan Latimer testified that she had, in the course of her duties over some years, become familiar with Hastings Creek and knew it to be frequented by fish. Alvin Wallach, a fisherman, actively engaged for some years in the rehabilitation of Hastings Creek and implanting it with steelhead trout, testified that he knew the creek to a level well above the Mountain Highway bridge was frequented by fish.

14. On these facts I find that the Defendants caused a substantial quantity of polluted water to flow into Hastings Creek, a water way frequented by fish and that this substance was deleterious to fish.

15. The defence has suggested that samples should have been taken from Hastings Creek itself. However, *R. v. MacMillan Bloedel (Alberni) Limited 47 C.C.C.* 2nd 118 decided by B.C.C.A. on April 5th, 1979 finds that this is not necessary.

Seaton, J.A., at P. 121 quotes

> "Once it is determined that bunker sea oil is a deleterious substance and that it has been deposited, the offence is complete without ascertaining whether the water itself was thereby rendered deleterious."

16. The defence has also raised the possibility that some or all of the toxic substance present at the outfall may have come fortuitously from surrounding drainage and not from Block B. *R. v. MacMillan Bloedel Industries Ltd.* decided March 17th, 1976 in the B.C. Supreme Court was raised. There however the Court found specifically that at the point of discharge into the river, the substance was not deleterious. Here however, the only rational conclusion I can draw is that the substance, which was deleterious when it was pumped onto the road from the defendants' property, was the same deleterious substance that was deposited in Hastings Creek from the sewer outfall. It may have been somewhat diluted by rain, which Susan Latimer says was falling lightly as she took her samples. But there is no evidence to suggest that the toxic substance had an alternative source. I find that this is speculation, and the Prosecutor rightly cited the Supreme Court of Canada decision *R. v. Bagshaw*.

17. The Defendants rely mainly, I believe, on the defence that they acted in a reasonable and prudent manner and with due diligence in the circumstances. *R. v. City of Sault St. Marie* was cited and its application by Judge Provenzana of the British Columbia County Court in *R. v. Byron Creek Collieries Limited* decided on September 13th, 1978.

18. I find that the facts do not support such a defence. Seaton, J.A. in *R. v. Gulf of Georgia Towing Co. Ltd.* decided by the B.C.C.A. on February 7th, 1979 10 B.C.L.R. 134, emphasis that "due diligence" according to circumstances may mean the taking of positive steps, even extraordinary steps, to ensure the safe handling of a noxious substance. He was of course dealing with subsection (3) of Section 33 of the *Fisheries Act* but equated the defence of due diligence offered by subsection (8) to that provided by *R. v. City of Sault St. Marie*.

Here I have found that Mr. Shaw was made aware by Susan Latimer that the water in his ponds was dangerous and should not be permitted to escape into Hastings Creek. He admits that he discussed her phone call with the construction foreman, Mr. Christiansen. Mr. Christiansen stated in evidence, as I say, that it took two days to pump out these ponds using two pumps, one on each pond. Yet he made no investigation or inquiry as to where the polluted water was going after it reached Mountain Highway in front of Block B.

19. Both Mr. Shaw and Mr. Christiansen testified that they did not then know where that particular storm sewer or in fact any of the storm sewers in North Vancouver went and they made no relevant inquiry. Mr. Christiansen testified that at the time he didn't know that Hastings Creek passed under Mountain

Highway only a block away down the same road that the liquid from the pump was running. He apparently made no inquiry or investigation.

20. The permission apparently given by the District Engineer's office to pump out onto the street and through the storm sewers was not, I find, an end to the responsibility of the Defendants. The Defendants and their servants were obliged to take reasonable care in ensuring that this water, that they had reason to believe might be dangerous to fish, did not escape into Hastings Creek or any other water frequented by fish.

I find that here they did not demonstrate such reasonable care and prudence. In arriving at these conclusions, I have also had reference to the Supreme Court of Canada decisions, *R. v. City of Sault St. Marie* and *R. v. Pierce Fisheries Ltd.*

SENTENCING

Did counsel wish to make any submission on sentence?

MR. CORBETT

Yes, Your Honour. I would prefer to do it now.

. . .

MR. CORBETT

First of all, with respect to mitigating factors on the issue of sentencing. As Your Honour is aware, there are apparently what are some disagreement at least between two governing bodies and Mr. Shaw in some respects at least was caught in the middle. The evidence, as Your Honour has found, that Mr. Shaw did contact the District of North Vancouver and Mr. Shaw was told that he could not pump it into the sanitary sewer, that he had to pump it into the storm sewer.

Now, as Your Honour has found that that's not sufficient to get around a conviction under this particular Act, but nonetheless in my submission, it's not a situation where Mr. Shaw was just recklessly pumping it into the storm sewer. He asked if he could pump it into a sanitary sewer and was told by the District that he couldn't . What subsequently happened was after Mr. Shaw was prosecuted for this, the District of North Vancouver relented and allowed him to pump into a sanitary sewer and he was able to continue. So unfortunately the Defendants were caught between two governmental bodies who took different positions on this particular point.

The other mitigating factors include the pollutant itself. The evidence was that the defendant Marbar and the defendant Compac weren't responsible for the placing of any of this hog fuel on the site. It was placed by an independant contractor, and none of this hog fuel was placed in water. It was at a time of extraordinary rainfall. And because of a lot of unusual circumstances this water apparently leached through some of this hog fuel and down into the ponds and indeed was pumped out because it had to be done for the purposes of excavation and construction. There was no reason to suspect that this was a substance which was going to be toxic enough to kill fish in the sense, as your Honour will recall, the evidence on it in the first pond didn't kill any fish at all and the evidence on the second pond was that it was toxic, in other words, they weren't even remotely the same substance in the ponds. The evidence of the Crown witnesses was that they couldn't tell the difference between the ponds, so, in my submission, it's a little difficult to expect Mr. Shaw or any of the other defendants to know that one of these ponds was found to be toxic when the tests showed that one was extremely toxic and one -- well, the only effect it had was that the fish didn't swim as well in the muddy water over the time period.

Now, there's no suggestion that the problem continued after May 21st, in other words, when the fisheries officers came down and told Mr. Shaw that he couldn't pump it into the storm sewer, that was the end of the matter, it stopped then.

There was another important factor in these types of prosecutions, according to decided cases as this, Your Honour, and that is, has the defendant got any kind of pecuniary advantage out of his wrong?

Well, in this particular case there is no suggestion whatsoever that this was done and the law was violated with an intention to gain pecuniary benefit on the part of the defendants. The defendants were left with the position that they had to pump out and there was the confusion between the governmental authorities and no money was realized by the defendants. They were doing what they were told.

Another important fact, Your Honour, in terms of sentence, is that there was no environmental impact demonstrated whatsoever. In other words, there's no suggestion that there was any fish whatsoever in this stream. There was some foaming on the stream, but that stream which was apparently, as the witness has indicated, teeming with fish as this one appeared to be, there wasn't any suggestion that any fish died from this polluting.

Now, with respect to the ability to pay, the Corporations undoubtedly have the ability to pay a fine, but this particular site has been a headache, even to the present day there is litigation going on on this site. Unfortunately what happened, Your Honour, is that it was a pre-sold building site and the market -- the real estate market in this city dropped in between the date of the sale and the date of completion, and now there is a suit for specific performance involving all of these lots and the owner of the property. Marbar, is still the owner by virtue of the fact that the other people have not completed as indicated in the evidence, they didn't come through in significant time and money had already been spent by the company on this, this very litigation. So, in my submission, reading the cases on sentence that I have, Your Honour, they don't appear to be too helpful in terms of the fact that they, on their facts, they range from very large fines for very large corporations, dropping PCB's into water, to very small fines and other situations where there eventually have been an accident.

In my submission the Defendants in this particular case, a nominal fine is probably all that is required. The Defendants undoubtedly have gone to significant expense to contest this matter, came and contested the matter. It's not a case where there has been some sort of incredible wanton disregard for the law as much there's been a mistake by the Defendant in pumping water which they didn't know there was anything wrong with and which the City gave them "a bum steer" if I may put it that way.

LAYTON, Prov. Ct. J.

Well, you will appreciate I have specifically found that Mrs. Latimer warned them --

MR. CORBETT

Yes, I appreciate that.

LAYTON, Prov. Ct. J.

-- that it's liably dangerous.

MR. CORBETT

Yes, she -- I though Your Honour found that Mrs. Latimer told him not to pump it into Hastings Creek in the sense that it may contain some contaminants, which indeed was what the Defendants did not do. They went and checked it out with the City. They didn't realize --

LAYTON, Prov. Ct. J.

I am satisified that they knew that that was water was liable to be dangerous.

MR. CORBETT

Well, with respect then, Your Honour, I won't go on with that point, other than to say that on the face of it one sample wasn't dangerous at all, even in a hundred percent concentration to fish were fine. In the other, there was apparently some toxicity and the Crown witnesses indicated that they couldn't tell the difference and they didn't know -- there didn't seem to be any rational explanation and I don't --with respect, I am of the opinion and I so submit that the Defendants couldn't be presumed to know that it was as toxic as it was. It appeared to them to be dirty water and they acted accordingly. It's not as if they were pumping PCB or toxins or oil straight into the water. They understood they were essentially dumping dirty water, which it wasn't a very good idea.

My submission is that a fine somewhere in the five hundred to one thousand dollar range is sufficient to deter this sort of conduct in all the circumstances for the Defendants.

LAYTON, Prov. Ct. J.

Yes, counsel?

MR. KIER

Your Honour, the fine is up to fifty thousand dollars for this offence. Your Honour has found two days -- and this is the Crown's submission, that this was the tail end of the pumping out. The rear pond was extremely toxic, all the fish died, Your Honour, in five minutes so that this, in the Crown's submission, is a fairly serious matter in view of the fact that it is another case where the environment always gets second or third best as far as treament goes when it comes to activity of an entrepreneur such as this person or anything happening, especially in this area, Your Honour. It's the public have been creating a lot of input into this and in this creek when Mr. Wallach -- a hundred thousand fry had been put into the creek over the last five years. A large body of people in this area, Your Honour, are concerned about the environment and, in my submission, that should be a consideration for Your Honour. This is not a dead fish stream, as it were. This is a very live and viable fish stream and should be protected by the law and not just given lip service to an ordinary -- now some dead stream, as quite often happens in various municipalities when construction and building goes on and nothing happens until far too late and then of course the fish stream is absolutely dead as far as fish are concerned.

Here there has been a great input in trying to re-establish this stream with good results apparently and should be dealt with accordingly by Your Honour.

As I said, it is a toxic substance that was put in, considerably toxic, and the Crown views the matter with the Defendants showing little regard whatsoever, Your Honour, for the pollution laws. They have merely gone ahead and done what to them was expedient and with little care for the environment and I would ask Your Honour to take into consideration the deterrent effect not only to these two corporations but to any other corporations or individuals in this area, in fact in the whole of the Province, that they must govern themselves with due regard to the pollution laws as well as with the economic laws that we all have to govern ourselves with as well.

LAYTON, Prov. Ct. J.

Yes?

MR. CORBETT

Just one comment, Your Honour, on the matter. My friend made very much of a large point of the view that this was a large and active fish stream. I can tell Your Honour that that was not the totality of the evidence. As Your Honour will recall, Hastings Creek was described as a creek which was filled with beer cans and all sorts of terrible things at the time. It was very much a surprise to not only myself but the defendant, Mr. Shaw, that this kind of stocking of the fish had been done, it was totally unknown at the time. It was thought to be a dead stream.

LAYTON, Prov. Ct. J.

Well, I am satisfied that an appropriate fine should be large enough to act as a deterrent to these companies as well as a general deterrent to other companies as well as a general deterrent to other persons in the community who may handle substances which are toxic to fish. I find that most of the cases of this type come before these courts in any event involved carelessness or a desire to avoid the cost of properly containing or dispensing of these substances. I will try to be consistent with earlier fines levied by these courts and levy a fine of fifty-five hundred dollars on each count, total of eleven thousand dollars.

MR. CORBETT

Are there two counts?

LAYTON, Prov. Ct. J.

I'm sorry, to each, fifty-five --

MR. CORBETT

There was only essentially one charge.

MR. KIER

Yes, two defendants with one count, Your Honour.

LAYTON, Prov. Ct. J.

I'm sorry, fifty-five hundred dollars to each defendant.

BRITISH COLUMBIA COUNTY COURT

R.v. COMPAC CONSTRUCTION LTD. et al.

LEGGATT, Co. Ct. J. Vancouver, September 9, 1983

***Fisheries Act*, R.S.C. 1970, c. F-14, as amended, accused appealing conviction of charge under section 33(2) - Depositing a deleterious substance into water frequented by fish Hog fuel leachate onto Mountain Highway, from there, contaminated water ran into Hastings Creek - Definition of deleterious - Defence of due diligence considered - Appeal dismissed.**

The accused was charged with violating section 33(2) of the *Fisheries Act* R.S.C. 1970, c. F-14 as amended. The judge at trial convicted both of the accused and fined them each $5,500. The accused appealed on two grounds. First, that the substance deposited had not been proved to be deleterious within the meaning of the Fisheries Act; and second, that if the substance is found to be deleterious, the defendant is excused because he exercised reasonable care in the circumstances.

Held, the Appeal was dismissed.

The Court held that section 33 does not require that the water is toxic to fish to sustain a conviction but only that alteration of the quality of that water occur so that it is rendered or is likely to be rendered deleterious to fish.

There was evidence before the trial court that the water in question was a deleterious substance. There is no other reasonable inference to be drawn than that if at least two of the three samples that were added to water would alter the quality of that water so that it is rendered or likely to be rendered deleterious to fish or fish habitat.

The appellants failed to take reasonable care by simply pumping the deleterious substance onto the highway without making any reasonable investigation as to whether it would or would not pollute the creek. By failing to resolve the dilemma they had been placed in, through enquiry, negotiation or otherwise, they indicated a callous disregard for the consequences of their actions and neglect. With a minimum of enquiry or even the institution of a joint meeting, the appellants problem could have been resolved and some sort of safe method found to deposit the deleterious substance.

D.R. Kier, for the Crown (Respondent).
T.J. Corbett, for the Accused (Appellant).

LEGGATT, C. Ct. J.

This is an appeal by the appellants against a conviction under section 33(2) of the *Fisheries Act*, on the 21st day of February 1983 before Provincial Court Judge Layton. The section provides as follows:

"Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or at any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water."

FACTS

The evidence before His Honour Judge Layton was as follows. The appellant, Compac Construction Ltd. was preparing to build an apartment, but before doing so, had to drain two large excavations. On April 29, 1981 a habitat protection officer with the Ministry of Environment visited the site and became concerned with water filled excavations or ponds which were contaminated by hog fuel leachate. She knew from her professional experience that hog fuel leachate could be toxic to fish. She subsequently telephoned the president of both the defendant companies and identified herself and advised the president of the companies that the property was contaminated by leachate and dangerous to fish, and the leachate should not be allowed to escape or be pumped into Hastings Creek or any other water which was frequented by fish.

Having heard from the conservation officer, the representative of the appellants enquired as to an appropriate method of disposal. A representative of the Engineering Department of the District of North Vancouver advised him that he could not pump the leachate into the sanitary sewer system. The appellants, somewhat on the horns of a dilemma but without further enquiry, began pumping the material from their property.

Subsequently on May 21st, the same official along with a conservation officer, in response to a complaint, found that Hastings Creek located below an outfall was black and foaming, and further determined that the leachate ponds were being pumped out onto the highway. The substance was therefore running down the highway into a catch basis and ultimately into Hastings Creek.

The appeal is based essentially on two grounds: (1) that the substance deposited was not proved to be deleterious within the meaning of the *Fisheries Act*; and (2) that if the substance is found to be deleterious, the defendant is excused because he exercised reasonable care in the circumstances and the doctrine of *R.* v. *The City of Sault Ste. Marie* (1978) 85 DLR (3d) 161 should apply.

"Deleterious substance" is defined in the Act as follows:

> " 'Deleterious substance' means
>
> (a) any substance that if added to any water would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat, or to the use by man of fish that frequent that water, or
>
> (b) any water that contains a substance of such quantity or concentration or that has been so treated, processed or changed by heat or other means from a nature state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat, or the use by man or fish that frequent that water."

The Fisheries' technician took three samples; first from the outfall of the storm sewer, a second from the front pond on the site, and a third from the back pond. Each sample was tested with what is called a "bioassay". Two fish died in the test of the sewer outfall and no fish died with respect to the front pond test, all fish died with regard to the test of the back pond of water. This was certainly substantial evidence to support the learned Provincial Court Judge's finding that the appellants caused a substantial quantity of polluted water to flow into Hastings Creek and that that was a waterway frequented by fish. No samples were taken from Hastings Creek itself. Mr. Justice Seaton in *R.* v. *MacMillan Bloedel (Alberni) Limited*, 47 CCC (2d) 118 (BCCA) at p. 121 dealt with this issue as follows:

> "Once it is determined that bunker sea oil is a deleterious substance and that it has been deposited, the offence is complete without ascertaining whether the water itself was thereby rendered deleterious."

The appellants take the position that there was no evidence as to whether this was a deleterious substance since it would be only by adding samples taken from other water that could make this determination. Each of the tests was done in a 100% concentration of the sample and the defence argued that they did not meet the definition of "deleterious substance". With the greatest respect I cannot agree. The definition is "any substance that if added to any water would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat ...". The section does not require to sustain a conviction that the water is toxic to fish, only that "alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish". Certainly there was evidence before the learned Provincial Court Judge that the water in question was a deleterious substance. There is no other reasonable inference that can be drawn than that if at least two of the three samples that were added to water would alter the quality of that water so that it is rendered or likely to be rendered deleterious to fish or fish habitat. Therefore I find that the learned Provincial Court Judge did not err in law in finding that there was a deposit of deleterious substance.

There is no question that this is an appropriate section to apply this strict liability test of *R.* v. *The City of Sault Ste. Marie* (supra), if the appellants exercised reasonable care in the circumstances. On the evidence as accepted by the learned Provincial Court Judge, the appellants were placed on the horns of a dilemma. They were warned about the danger of pumping the ponds into Hastings Creek, and were denied permission by the North Vancouver Engineering Department to pump the water into the sanitary sewer system. Thereafter, without any evidence of further enquiry, the appellants saw fit to pump the ponds onto Mountain Highway which led to Hastings Creek. There was no evidence that the appellants did any investigation or enquiry as to where the polluted water would be deposited after it reached the highway.

The appellants failed to take reasonable care by simply pumping the deleterious substance onto the highway without making any reasonable investigation as to whether it would or would not pollute the creek indicates neglect, and by failing to resolve the dilemma they had been placed in between the officials of the Ministry of Environment and the Engineering Branch of North Vancouver through enquiry, negotiation or otherwise, indicated a callous disregard for the consequences of their actions and neglect.

Accordingly, I do not find they demonstrated the kind of care and prudence that had been exercised in the decision of *R.* v. *The City of Sault Ste. Marie* (supra), and in the more recent decision of Judge Provenzano of the British Columbia Court in *R.* v. *Byron Creek Collieries Limited* (1978) 8 C.E.L.R. 31. In the *Byron Creek* case, the appellant had taken all reasonable care and had shown due diligence in attempting to prevent the pollution. There the unforseen and unexpected rain provided a defence to the charge.

Mr. Justice Dickson in dealing with the principles of strict liability offences in *R. v. The City of Sault Ste. Marie* (supra) at p. 173 said:

> "The doctrine proceeds on the assumption that the defendant could have avoided the prima facie offence through the exercise of reasonable care and he is given the opportunity of establishing if he can, that he did in fact exercise such care."

I do not find in the case at bar that the appellants exercised reasonable care. With a minimum of enquiry or even the institution of a joint meeting, the appellants' problem could have been resolved and some sort of safe method found to deposit the deleterious substance.

Very largely for the reasons given in the very full and detailed judgment of the learned Trial Judge, the appeal against conviction is dismissed.

With respect to the sentence imposed, which was a fine of $5,500.00 against each of the defendants, given the maximum penalty provided by law for this offence, and also given the lack of care exhibited by the appellants, I believe the fine to be appropriate and accordingly, the appeal with respect to the sentence is also dismissed.

BRITISH COLUMBIA PROVINCIAL COURT

R.v. CROWN FOREST INDUSTRIES LTD.

SCHMIDT, Prov. Ct. J. Campbell River, April 28, 1987

Sentencing-*Fisheries Act*, R.S.C. 1970, c.F-14 as amended - Accused pleaded guilty to charge under section 33(2) - Depositing a deleterious substance into water frequented by fish - Effluent containing Tetrachlorophenol and Pentachlorophenol, into Casey Creek and Duncan Bay - $4,000.00 fine levied.

In the midst of transporting chlorophenols from one permanent location to another permanent location the accused spilled some 26 gallons of the chemical. During the pumping of the chlorophenols into a tote tank, the pump broke down and a replacement pump was obtained. Once this replacement tank was hooked up, an employee of the accused shut off the pump and went for a break. However, the pump had not been properly shut off and chlorophenols spilled out of the tote tank and onto the tarmac. A nearby storm sewer collected some of the contaminants.

The employee involved responded very quickly by spreading sawdust immediately over the chemical and alerting a supervisor. A berm was created around the area where the outfall was and soon after the spill a vaccum truck was on the scene working to suck up the contaminants that had escaped.

The accused pleaded guilty to the charge and the Court levied a fine of $4,000.

The spill occurred because of an extraordinary procedure. The accused company had conformed to standards set by Environment Canada regarding use of the chemical and emergency procedures to be followed in the event of a spill.

Sentencing in this case must act as a deterrent. The fine should also commend those companies who voluntarily report spills and have in place procedures to minimize any accidents with the dangerous substances that they must use on a day to day basis.

J.D. Cliffe, for the Crown.
D.W. Shaw, for the Accused.

SCHMIDT, Prov. Ct.J.

This is a charge of unlawfully depositing or permitting to be deposited a deleterious substance into a water frequented by fish. There is one count that I am dealing with today.

At the outset I wish to say that I think envrionment law has advanced to the point where it is no longer necessary to describe each of the principles of sentencing which pertain to environmental law, or to offer an opinion or explanation as to each of them. That has been done in a number of cases. Those cases are before me. I have read the cases and considered the principles of sentencing set out therein.

The facts of this case are that the company, Crown Forest Industries Limited, operates a sawmill and pulpmill at Elk Falis outside of Campbell River. They use a substance called Tetracholorophenol or Pentachlorophenol for the purpose of treating freshly sawn lumber to make it acceptable for export. That product and method has been used for some time for woods which are exported. At one time it became apparent to the environmental authorities that it was a highly toxic substance, and the sawmills should use some caution in the application and storage of that substance.

In 1983, Environment Canada published a book called *The Chlorophenate Wood Protection Recommendations for Design and Operation.* That was a result of wood protection task force, and as a result of the task force and this document, two seminars were held which this company attended. The document begins with some general remarks with respect to the use of the wood protection substance, and does in fact establish that it is a substance which is vital to the British Columbia economy at this point of time, and it also states that there needs to be ongoing research to determine how the substance can be better used so that there is no possibility of the substance affecting the environment. I note that this is a very recent work, and that presumably there is much work to be done in this area.

This spill arose which involved some 26 gallons of the Chlorophenols. It did not arise as the result of the normal use and application of the Chlorophenols. It appears from what's been before me that the company has complied in the application and storage of the Chlorophenols with the recommendations of Environment Canada. From the glimpse that I have of the company's operations in this regard through the photographs, it appears at least that some of the recommendations are being followed, and perhaps all of them. The substance appears to be stored in a tank in a building under a roof. Those are some of the recommendations that were made.

But the spill arose not at the result of the application or storage of the substance, but as a result of the removal of the substance from one permanent location to another permanent location. The tank in which is was normally stored was being emptied and the remaining Chlorophenols that were in that tank were being transported to the new permanent facility.

The Chlorophenols were pumped from the tank where they were permanently stored, into what was referred to as a small tote tank, and it is at this point that the spill occurred, and it occurred as follows: the Chlorophenols were being pumped into the tote tank, and the pump broke down. A replacement pump was obtained and the required hookups were made and the pumping process continued. At approximately 9:20, the employee who was involved in the pumping from one tank to the other, shut off the pump and went for a break. At 9:25, it was discovered that there -- the pump had not been properly shut off and was still pumping into the tote tank, and as a result the Chlorophenols were being spilled onto the tarmac. The employee that made the discovery appears to have acted very quickly. Within three minutes, there was sawdust being spread to contain and absorb the Chlorophenols. A supervisor or somebody of some supervisory capacity was advised of the spill immediately, and attended. He noted that there was a storm drain nearby which was collecting some of the spill. He went to the outflow of that storm drain and took with him apparently some men with shovels, and they created a berm around the area where the outfall was and in doing so created a lagoon which contained much of the spill.

The mill itself was also shut down as a result of the order of the supervisor within minutes. At 9:50 a vacuum truck was on the scene of the lagoon that had been created to contain the spill and was working by 10:00 to suck up any contaminants that had escaped. The company estimates that while 26 gallons was orignally spilled, that only three to five gallons got away. It was as a result of the quick action by the emergency cleanup crew that the whole of the 26 gallons did not get away, and that the great deal of environmental damage was prevented.

This company does not have a previous record of environmental damage. It was not the normal procedure in application and storage of this dangerous substance which led to the spill. It was an emergency procedure, or I should say an unusual procedure which led to the spill. The company was not sufficiently diligent in that they did not take the extra care required when dealing with this type of dangerous substance. In hindsight it would have been appropriate to sand bag any nearby storm drains. It would have also been appropriate to place somebody at the pump to oversee the tote tank while the other employee went for this coffee break. It is precisely this type of hindsight that the company is expected to have as foresight in order to prevent this kind of spill of dangerous substance, and because they did not have this foresight they have pled guilty to the offence and are now before the Court.

I find that the emergency cleanup procedure of the company was commendable. I find that they made no attempt to hide what had happened, was also commendable. On the facts I have before me it appears that it would have been a very easy matter indeed to simply ignore this spill and not make any reporting to the authorities.

I have also heard evidence that the company has spent some $80,000.00 to re-route the storm drain to connect it to the central storm drain which has the capacity to be shut off.

The damage that has occurred is hard to analyze. It is true that a number of fish were killed. These fish that are in the photographs are some one and a half to two inches long, and that damage appears to have occurred in the shallow waters of Casey Creek and the mud flats. Whether there was any damage to the migrating fish that were mentioned by the Crown, it is difficult to know. It is certainly clear that there would have been a great deal of diluting take place once this substance actually got into the waters of Duncan Bay rather than just into the tidal areas and the stream of Casey Creek.

SENTENCING

The company admits that this substance is highly toxic, and it admits the evidence of the Crown as to the toxicity of the substance. The Crown seeks a fine in the nature of $25,000.00 and has referred me to a number of cases in order to support that proposal. The Defence has referred me to a number of other cases ranging between $1,000.00 and $5,000.00 and seeks that type of fine.

In my view, this is a case which where the Court should be careful in assessing too great a fine. I say that for this reason. This is a substance which apparently must be used in this industry at this time. There should be standards which are applicable to the industry to prevent that substance being spilled. Many of those standards have recently come into place in the booklet which is Exhibit four in these proceedings, and there is nothing before me to indicate that this company deviates in any way from the standards which are set out. The spill occurred because of an extraordinary procedure. There is no likelihood apparent that it will be repeated because it is not a normal procedure. It is evident from what is before this Court that the company also complies with the emergency procedures which are set out in the Exhibit four in the event of a spill. I have reviewed those procedures, I have reviewed the evidence, and the company followed the procedures exactly. What they did not do was to phone the Fisheries Department immediately. The booklet does not advise them to phone the Fisheries Department immediately. If one follows the procedure set out there, the main emphasis is to take whatever steps can be taken to contain this spill. That is exactly what was done. It would have been very unfortunate had Crown Forest phoned Fisheries and then waited for them to come and advise because the environment would have received the impact of the full 26 gallons.

I think that it is important in cases where there has been compliance, where the spill arose as a result of an accident, where there has been -- where it is evident that the company is concerned and is able to deal effectively with spills, and where a company reports a spill even though they could well have got away without reporting it, to commend the company.

A fine in the nature of what is suggested by the Crown would act as a deterrent from reporting. It also would act as a discouragement to companies who have to deal with dangerous substances, to have in place emergency operations procedures and yet still must face rather crippling fines as a result of accidental spills.

I refer to the case which seems to be referred to quite often, *Regina v. United Keno Mines*, found at 1980, 10 Canadian Environmental Law Reports, and that's at page 43. His Honour Judge Stuart says at page 49:

> "Voluntarily reporting the violation to authorities indicates a genuine desire to act responsibly. The bulk of environmental regulation depends upon the integrity of corporations to provide full disclosure of the impact of their operations on the environment. Voluntary reporting breaches must be acknowledged as a mitigating circumstance by the Court in sentencing."

The sentencing in my view must do two things in this particular case. Firstly, it must act as a deterrent. It must be known in the industry that the Courts will take the rules and regulations seriously. They will stand behind the environment and attempt in whatever way to protect the environment through penalizing those who would be careless with the use of these substances.

The fine that I will impose I hope does have the effect of deterring. I also desire that the fine has the effect of commending those companies who voluntarily report spills, who have in place procedures to minimize any accidents with the dangerous substances that they must use on a day to day basis.

In my view, a suitable fine in this case would be in the amount of $4,000.00, in default distress.

BRITISH COLUMBIA PROVINCIAL COURT

R.v. CROWN ZELLERBACH PROPERTIES LTD.

HUSBAND, Prov. Ct. J. Port Coquitlam, February 27, 1984

***Fisheries Act* R.S.C. 1970, c. F-14 as amended, accused acquitted of five counts under section 33(2) - Depositing a deleterious substance into water frequented by fish - Land fill leachate - Gyproc and dissolved wood waste into Laurentian Creek and tributary of School House Creek - Due diligence defence successful.**

The materials used at the landfill site were in conformity with the company's permit. The original construction of a dyke to contain the fill was unsatisfactory and the company had been previously convicted under section 33(2). The original concept of containment by dyke had been modified to include plugging and sand bagging specific leachate sites, and grading to facilitate drainage of surface water. The quantities of leachate forming the basis of the five counts raised in volume from a small trickle to a gallon per minute. The company continued to believe into the spring of 1981 that the only viable method was containment, and no evidence was put before the Court that at that date, there were better methods available.

The company's manager of Research and Applied Science Branch was attending daily at the property; engineering and scientific studies to resolve the leachate problem were commissioned; two pilot aeration projects were begun. The company spent $250,000 trying to resolve the problem. Officials worked closely with the company from March 1981 to January, 1982 and tacitly approved of the company's efforts; however, in March, 1982, a new District Manager of Fisheries announced that the company would be charged. At no time was there evidence of dead fish in any of the three streams.

The Crown argued, inter alia that section 33(8) places a higher duty on the company than that of due diligence because that section, dealing with commission of the offence by an employee or agent of the accused, requires the exercise of "all due diligence" by the accused.

Held, the accused was acquitted.

The Crown proved all the essential ingredients of each count; however, the company acted with due diligence as that phrase was defined by Mr. Justice Dickson in *R.* v. *Sault Ste Marie*. The case is distinguished from *R.* v. *The Gulf of Georgia Towing Co. Ltd.* Here the company did not know how to solve the problem and took all reasonable steps to contain it. From August, 1981, when the company realized an increased oxygen level would resolve the problem, all reasonable steps were taken.

The Court also found that leachate is a substance in itself deleterious within the meaning of the Act. The Court noted that leachate from the company's land was formed from two services, gyproc and dissolved wood disregard waste. Gyproc releases suphates which oxidizes to form sulphides highly toxic to fish. Both the sulphates and the wood disregard waste, which dissolves in water remove dissolved oxygen. The Court found that leachate is akin to a drop of oil in the *R.* v. *MacMillan Bloedel (Alberni) Ltd.* Court of Appeal decision.

A Fisheries Official gave evidence that water samples taken from the three creeks, at or near the entry of the leachate to the creeks, showed reduced levels of dissolved oxygen to a point that was a serious threat to fish. The same sample showed a sulphide content above that in which fish can survive. On cross-examination the official admitted that the result of the bioassays was speculative. The Court found as a fact that no fish had died at any time in any of the three creeks, that the company retained Beeker Laboratories to perform bioassays and that by using a two horn pre-aeration period over a 96 hour period, an 80% survival rate was obtained. The Fisheries official's position was that a 90% survival rate during bioassays would suffice. He stipulated that bioassays to be reliable must have a 20 minute pre-aeration period; the Court found there was no clear evidence that this was correct.

The Court was satisfied beyond a reasonable doubt that the three creeks were waters frequented by fish. Although there were no dead fish and perhaps less than 25 fish in the whole system, it was clear that from time to time fish had been observed in Laurentian and School House Creeks.

D.R. Kier, Q.C., for the Crown.
B.W. Shaw, Q.C., for the Accused.

HUSBAND, Prov. Ct. J.

The Corporate defendant is charged as follows: "On or about the 2nd day of March, 1981, at the District of Coquitlam, Province of British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance, land fill leachate, in water frequented by fish, Laurentian Creek, in violation of section 33(2) of the *Fisheries Act*."

Count 2: "On or about the 27th day of May, 1981, at the District of Coquitlam, Province of British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance, land fill leachate, in water frequented by fish, Laurentian Creek, in violation of section 33(2) of the *Fisheries Act*."

Count 3: "On or about the 24th day of November, 1981, at the District of Coquitlam, Province of British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance, land fill leachate, in water frequented by fish, Laurentian Creek, in violation of section 33(2) of the *Fisheries Act*."

Count 4: "On or about the 24th day of November, 1981, at the District of Coquitlam, Province of British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance, land fill leachate, in water frequented by fish, unnamed tributory of School House Creek or in a place under conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water, in violation of section 33(2) of the *Fisheries Act*."

Count 5: "On or about the 12th day of January, 1982, at the District of Coquitlam, Province of British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance, land fill leachate, in water frequented by fish, Laurentian Creek, in violation of section 33(2) of the *Fisheries Act*."

The accused company has changed its corporate name since the swearing of the within information to "Crown Forest Product Limited" and shall be referred to hereafter as the "company". The company was at all material times the owner of land known as district lot 48 and 61, bounded as follows;

1. on the south by the Lougheed Highway;
2. on the west by King Edward Street;
3. on the east by School House Road;
4. on the north by an unnamed road;

in the Municipality of Coquitlam and shall hereafter be referred to as the "property".

The property contains three creeks as follows;

(a) no name creek which rises on district lot 48 and flows south on the property into a ditch on the north side of the Lougheed Highway and then east 'til it meets the confluence of Laurentian and School House Creek still on the north side of the Lougheed Highway;

(b) School House Creek which commences from a point north of the property and flows almost due south through the property until it connects with no name creek and Laurentian;

(c) Laurentian Creek which commences from a point somewhere north east of the property - it flows through the property in a south-west direction until it joins with School House and no name creek and forms one creek and becomes known as School House flowing south under the Lougheed Highway and on to the Fraser River;

The company obtained a permit from the Provincial Pollution Control Branch to carry on a land fill on the property on October 13, 1977.

A pollution problem developed in the form of leachates flowing from portions of the land fill.

The issues before me are as follows:

1. Has the Crown established beyond a reasonable doubt that the land fill leachate was deposited as alleged and was it a deleterious substance within the meaning of section 33 sub-para 11 of the *Fisheries Act*?

2. Has the Crown established beyond a reasonable doubt that the land fill leachate on the dates and places specified in the five counts before me, constitutes waters frequented by fish within the meaning of section 33(2) of the *Fisheries Act*?

3. If the Crown has established points one and two, has the company on the balance of probabilities established that it exercised due diligence in its efforts to cope and resolve the leachate problem.

Section 33(2) reads as follows:

> 33(2) "Subject to section (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions which such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water."

Section 33(1) reads as follows:

> 33(11) "For the purposes of this section and 33.1 and 33.2, deleterious substance means (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water."

Section 33(8) reads as follows:

> 33(8) "In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission."

Turning to the evidence, the Crown called a number of witnesses in an attempt to establish as follows;

1. That the three creeks in question were frequented by fish;
2. That on the dates specified in the five counts there was leachate flowing from the land fill.
3. That this leachate was entering the creek specified in the respective count.
4. That the land fill leachate mixed with water of the creeks in question was deleterious to fish.

This evidence was as follows:

(a) on site inspections by the Department of Fisheries on the dates specified in the respective count;

(b) taking of photographs on the same dates showing leachate emanating from the property;

(c) the taking of water samples from the three creeks in question near the source of the leachate flow and also upstream from the flow;

(d) the performance of certain tests to determine the dissolved oxygen level and the sulphide concentration of the water of Laurentian and School House Creek at or near the leachate site;

(e) the performance of scientific tests on undiluted leachate namely, bio-assay designed to measure the effects of that pollution on fish.

Of all the Crown witnesses called the main thrust of the Crown's evidence was dependant upon the testimony of Mr. Otto Langer, a biologist with the Department of Fisheries. He has an impressive number of university degrees and practical experience and was qualified to give expert testimony in the field of pollutants that emanate from land fill and the effect of these pollutants when mixed with water on fish and fish ecology.

He stated that his department first started to realize that land fills could create pollutants that were harmful to fish in 1976. He stated that he attended the property on March 2, 1981 and observed a flow of leachate from the property into Laurentian Creek between School House Road and the Lougheed Highway.

On May 27, 1981, he attended at the property and the flow of leachates was 10% of what he had observed previously. The March 2, 1981 leachate site was plugged and sandbags of the leachate was now forming in a different location and flowing into Laurentian Creek.

On November 24, 1981, Mr. Langer attended the property and noted that a stepped wooden flume 25' long had been constructed with 4-5 foot ditch leading to it and was located in the general vicinity of the sand bags noted on May 27, 1981.

On January 12, 1982, Mr. Langer again attended the property in the same general location as the first structure and he noted a much larger wooden flume which produced a cascading effect as it drained a large steel walled collection pond. He testified that samples taken from each of the two flumes showed that the cascading effect of each had increased the dissolved oxygen content of the leachate with the second flume producing more dissolved oxygen than the first.

He testified that he was involved with the property from when the land fill was commenced in 1977 and that the land fill was originally built on boggy, swampy land. he observed hog fuel, wood waste material and construction waste, such as gyproc being deposited on the property. He stated that the gyproc produces sulphate from which sulphides are derived which are highly toxic to fish, also sulphide has a high oxygen demand and when it comes in contact with water it removes dissolved oxygen from the water and is harmful to fish. He further stated that 5 - 10% of the wood waste becomes dissolved in water to form carbohydrates which has a high oxygen demand producing the same effect on contact with the water with respect to the dissolved oxygen level as sulphides. Sulphides and the dissolved wood waste combine together to form leachate. The thrust of Mr. Langer's evidence is that water samples taken from the three creeks in question on the dates specified in the five counts at or near the entry of the leachate to the creeks showed reduced levels of dissolved oxygen to a point that provided a serious threat to fish and that the same sample showed the sulphide content was above that which the fish can survive. He stated that 20 parts per billion of sulphide is the critical level and the samples taken were 10 times that level.

On cross examination he admitted that the substances deposited on the land fill were in conformity with the permit issued by the Department of Pollution Control, that he was the driving force behind the company's efforts to solve its leachate problem. He admitted that the result of the bio-assays were speculative. He acknowledged that he did indicate to the company that if it were to reduce the sulphide level of the leachate to less than .1 parts per millium that it would be acceptable to the department. He would not deny that he had indicated to the company that .05 parts per millium would be acceptable to the department. He admitted that he told the company that bio-assays of the leachate which produced a 10% fish mortality rate would be acceptable and that the department would turn the other cheek with respect to the 10% that died.

I must say that I was somewhat taken aback by Mr. Langer's admissions on cross examination in light of what he said in chief. I noted that on cross examination he seemed determined to use the question as a spring board to launch into a subject that was not directly related to what was being asked and I formed the opinion that he was attempting to minimize what appears to have been a fairly close working relationship between himself and the company in its efforts to solve its leachate problems. The company relied on the evidence of Dr. Carl Wilson, manager of the Research and Applied Science Branch of the company. His academic qualifications are a Phd in civil engineering. In addition, he held the position he now holds with the Council of Forest Industries for a number of years. He started with the company at the beginning of 1980 although he wasn't initially in charge of the department. His evidence was carefully documented with three volumes of documents which are exhibits 37(a), 9b) and (c). This exhibit consisted largely of letters, reports and memos of conversations held with various members of the Department of Fisheries.

In February of 1980 he examined the property for potential leachate sites and at the same time consulted with Golder and Associates, soil and structure experts. As a result, on March 28, 1980, a site map was made to define the leachate problem areas. On April 25, 1980, the company made the following improvements to the property:

1. graded the property to improve drainage;
2. the dykes surrounding the land fill were strengthened;
3. the leachate sites were plugged with fill material;

He says that in the spring of 1980 the municipality cleaned out the creek bed of Laurentian Creek in an apparent attempt at flood control which had the potential of changing the course of the creek and the removal of shrubbery weakened the stability of the soil. This work was done without notice to the company and without its authority.

On October 21, 1980, the company tried to measure the rate of flow of leachate to determine the ration of leachate to water in the region of Laurentian Creek. At this time the company was carrying out inspection of a site on a regular basis and the entire dyke was walked every second week.

It was at this time that the company retained Atlantic Contracting to try and grade the site to a slope to provide a better run off of water, the theory being that less water on the site would reduce the flow of leachate, and negotiations were entered into with the Greater Vancouver Sewage and Drainage District for an agreement that the leachate could be disposed of through the district's disposal system. These negotiations were broken off when the district insisted it would accept the leachate into its system only if the rain water was separated from it. These negotiations were concluded in the fall of 1980. In addition, the engineering firm of Allen and Ashford were asked to prepare a report on how the site could be improved.

In April of 1981 B.C. Research Council was instructed by the company to study the site and make recommendations as to how to deal with the leachate problem. Dr. Wilson says that in the spring of 1981 he had increased his attendances at the site to the point that he was attending the site on a daily basis. The recommendations of the B.C. Research Council were considered by the company to be uneconomic. The company commenced it own pilot projects in an effort to aerate the leachate through hydraulic means and the first of which projects was in place by October 20, 1981. In mid November, 1981, the company realized that the original pilot project was not large enough to deal with the volume of liquid passing through the system but the construction of a new system couldn't be implemented until December 30, 1981 because of a lack of available power equipment.

In the spring of 1982 the company designed and installed a powered aeration unit with holding ponds of half to a third of an acre for each creek.

At the end of August, 1981, the Department of Fisheries for the first time told the company that it was not happy with the progress the company had made and wanted something done as soon as possible.

On September 25, 1980, the company had bio-assays performed by Beek Laboratories using leachate samples taken from Laurentian Creek and using a two hour pre-aeration period. 80% of the fish survived in a 96 hour period. Dr. Wilson stated that there had been no indication prior to October 1, 1981, that a two hour pre-aeration period for bio-assays was not acceptable and that a 20 minute pre-aeration period should be used. He also stated bio-assays performed on samples from the confluence of Laurentian Creek and no name creek and using a two hour pre-aeration period had a 100% survival of the fish tested.

Dr. Wilson stated that in the period between March 1980 and January 1982, he received no evidence of any dead fish in any of the three creeks, in fact there was no evidence of any dead fish to be found in any of the three creeks at any time.

Dr. Wilson stated that the working climate that existed between the company and the Department of Fisheries dramatically changed in March of 1982 when the new district supervisor announced at a joint meeting of the company and the department that the company was going to be charged. This was without any apparent prior warning.

Dr. Wilson stated that in addition to the efforts the company made to resolve its leachate problem, it expended a total sum of $250,000 to this end.

On cross-examination Dr. Wilson did not contradict his evidence and his credibility was not shaken.

Dealing with counsel's arguments: the Crown argues that the creation of the land fill on the company' property created a potential risk of pollution of which the company was aware and must be held responsible for any pollution that did occur. The Crown further argued that section 33(8) places a higher duty on the company than that of due diligence because that section requires the exercise of all due diligence. Finally, that the company took no action to deal with the leachate problem between January 1980 and January 1981 and that cannot be categorized as due diligence.

The company takes the following position; there was not sufficient evidence to find that the leachate mixed with water was deleterious, at least not beyond a reasonable doubt because the bio-assays that were performed were not reliable; the creeks in question were not creeks frequented by fish; taking into consideration all the circumstances, the company had exercised due diligence in dealing with its leachate problem.

FINDINGS OF FACT:

1. The materials used in the company's land fill are in conformity with the permit issued by the Provincial Government Pollution Control Branch.

2. Originally the intention of the company was to surround the property with an impervious dyke which would force the leachate to be filtered through the 30-35 feet of peat bog underlying the land fill.

3. The original concept of containment was modified to include plugging and sandbagging specific leachate sites throughout the property and grading of the property to facilitate drainage of surface water with the belief that this would reduce the leachate flow.

4. In the spring of 1980 the company was carrying out regular inspections of the dyke.

5. The original construction of the dyke was not satisfactory and the company was previously charged and convicted under section 33(2) of the *Fisheries Act*.

6. At the beginning of 1980 the company was entering into a new era in the history of this land fill and it had to find a solution to its leachate problem for which there were no apparent reasonably economic solutions and no specific scientific reports available with respect to industrial land sites.

7. In the spring of 1980 the company ascertained a potential leachate source throughout the property and mapped it.

8. In the spring of 1980 the company determined the various sources of water throughout the property.

9. The quantities of leachate released from the property and forming the basis of the five within counts varied in volume to a small trickle and difficult to locate to flows amounting to a gallon per minute.

10. Improvements to the property in 1980 were made through grading of the land fill, strengthening of the dykes and plugging and sandbagging specific leachate sites.

11. The company continued to believe until well on into the spring of 1981 that the only viable method of dealing with the leachate problem was containment, and there was no evidence up to that time brought before me to suggest at that date that there were better methods of dealing with the problem.

12. In the spring of 1981 the company greatly intensified its attendance at the property to the extent that Dr. Wilson was attending at the property on a daily basis.

13. During the first half of 1981 the company commissioned a number of engineering and scientific studies to resolve the leachate problem.

14. The company also attempted to determine the ratio of leachate to the volume of water for each of the three streams.

15. Two pilot aeration projects were commenced in the latter half of 1981 with the second project providing substantially better results than the first.

16. The methods used to determine the toxicity of leachate with respect to fish was the bio-assay.

17. In October of 1981 the company retained Beeker Laboratories to perform bio-assays and by using a two hour pre-aeration period over a 96 hour period, an 80% survival rate was obtained.

18. Mr. Otto Langer's position on the part of the Department of Fisheries was that a 90% survival rate during bio-assays would suffice.

19. In October 1981 Mr. Langer stipulated that bio-assays to be reliable must have a 20 minute pre-aeration period. There is no clear evidence that this is correct.

20. At no time between January, 1980 and January 1982 was there any evidence of any dead fish in any of the three streams on the property.

21. No name creek has never been observed to contain fish and the Department of Fisheries expert estimate that the whole system contained 25 fish or less.

22. Mr. Langer, between March of 1981 and January of 1982 was the motivating force behind the company's efforts to solve the leachate problem and tacitly approved of the company's efforts in that regard.

23. In March of 1982 the attitude of the Department of Fisheries dramatically changed when the new District Manager for the Department during a joint meeting of the company and the Department stated, and without warning, that the company was to be charged.

24. The company, in the spring of 1982, by installing powered aeration units for the two creeks.

25. The company spent $250,000 in its efforts to resolve the leachate problem some of which was during a period of economic retraction.

In the B.C. Court of Appeal Decision *R.v. Gulf of Georgia Towing Co. Ltd.* 10 B.C. Law Reports at page 134 Mr. Justice Seaton in giving the court's decision said at page 137:

> "Counsel for the appellant relied upon a recent decision, and important judgment, in *R. v. Sault Ste. Marie* ..., a decision of the Supreme Court of Canada handed down on 1st. May 1978. I must point out at the outset that we have a specific statutory provision. I refer to this case because counsel did and because I think that the common law is now substantially the same as this s. 33(8) provision."

Mr. Justice Dickson in giving the decision of the Supreme Court of Canada in *R. v. City of Sault Ste. Marie, 40 C.C.C.* (2d) page 353 at page 374 defines due diligence and its applicability as follows:

> "Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involved consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability."

In dealing with the issue of whether the leachate was deleterious substance within the meaning of section 33(2) of the act, I turn to the B.C. Court of Appeal decision in *R. v. MacMillan Bloedel (Alberni) Limited, 1979 Western Weekly Reports*, page 654 at page 658 Mr. Justice Seaton said as follows:

> "Section 33(2) prohibits the deposit of a deleterious substance, not the deposit of a substance that causes the water to become deleterious ....
>
> What is being defined is the substance that is added to the water, rather than the water after the addition of the substance. To rephrase the definition section in terms of this case, oil is a deleterious substance if, when added to any water, it would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that that water is rendered deleterious to fish or to the use by man of fish that frequent that water. Applying that test to the finding of fact here, Bunker C oil is a deleterious substance. Once it is determined that Bunker C oil is a deleterious substance and that it has been deposited, the offence is complete without ascertaining whether the water itself was thereby rendered deleterious."

And at the bottom of the same page Mr. Justice Seaton says:

> "The thrust of the section is to prohibit certain things, called deleterious substance, being put in the water. That is the plain meaning of the words used and is the meaning that I feel bound to apply."

DECISION

The leachate from the company's land is formed from two sources - gyproc and dissolved wood waste. The gyproc releases sulphates which oxidize to form sulphides which in themselves are highly toxic to fish. In addition, the sulphide has a high oxygen demand and removes dissolved oxygen from water which aquatic life requires for its survival. In addition, about 10% of the wood waste material will dissolve in water and resulting substance has a high oxygen demand. Leachate being a combination of both substances, once allowed to enter water frequented by fish, has a very detrimental effect on any fish that frequent this water. In my view leachate is akin to a drop of oil in the *Regina v. MacMillan Bloedel Decision supra,* and is a substance in itself deleterious within the meaning of the definition set out in section 33(1) of the Act. In dealing with the phrase 'water frequented by fish' as contained in section 33(2), it is clear from the evidence that the three creeks merge into one and flow south into the Fraser River. Although there were no dead fish and although there are perhaps less than 25 fish in the whole system, it is clear that fish from time to time had been observed in Laurentian and School House Creeks and I am satisfied beyond a reasonable doubt that the three creeks are waters frequented by fish within the meaning of section 33(2). I am satisfied in result that the Crown has proved beyond a reasonable doubt all the essential ingredients of each of the five counts.

It remains for me to decide whether the company has established on the balance of a probability that in dealing with the leachate problem it has acted with due diligence, putting it another way, whether the so-called reasonable man in the same circumstances would have acted in the same manner as the company.

The evidence of Dr. Wilson establishes that the original concept for dealing with the leachate problem was one of containment using an impervious dyke and thereby theoretically forcing the leachate to be filtered through the 30-35 feet of peat bog underlying the land fill before it could drain. The company set up a regular inspection of the entire dyke every second week. Dr. Wilson himself in March of 1981 was attending the land fill on a daily basis. There is no evidence that the breaks in the dyke and the leachate spills which occurred were not properly dealt with by plugging and sandbagging. There was no evidence before me that during 1980, that there was any scientific literature bearing directly on the problem of industrial land fill and leachate. There was nothing to suggest during this period that the original containment idea was not valid. The evidence seems to suggest that at least until August of 1980 the Department of Fisheries was satisfied with the progress being made by the company. It appears that Mr. Langer was working with the company in its efforts to deal with the leachate problem and indeed was the motivating force behind the steps the company did take to deal with the problem.

In my view during the period from January 1980 to August 1981, there were no solutions to the leachate problem. It was not like the case of *Regina v. The Gulf of Georgia Towing Co. Ltd., supra*. There the accused had the means by the exercise of reasonable care could avoid the oil spill. In the case at bar the company did not know how to solve the problem and took all reasonable steps to contain the problem and to solve the problem. It is further my view that during the period from August 1981 when the company realized that an increased oxygen level in the leachate would resolve the problem, all reasonable steps were taken from that date forward to the spring of 1982 to resolve the problem which was satisfactorily resolved in the spring of 1982.

For all of the above I am satisfied on the balance of probabilities that with respect to each of the five counts herein, the company has acted with due diligence as that phrase has been defined by Mr. Justice Dickson in the *Sault St. Marie* decision *supra*. Accordingly, in my view, all five counts must be dismissed and are hereby dismissed.

SUPREME COURT OF CANADA

HER MAJESTY THE QUEEN and CROWN ZELLERBACH CANADA LIMITED and ATTORNEY GENERAL OF QUEBEC and ATTORNEY GENERAL OF BRITISH COLUMBIA

CORAM:

Appeal heard: June 26, 1986
Judgment rendered: March 24, 1988

The Rt. Hon. Brian Dickson, P.C.
The Hon. Mr. Justice Beetz
The Hon. Mr. Justice McIntyre
The Hon. Mr. Justice Lamer
The Hon. Mme Justice Wilson
The Hon. Mr. Justice Le Dain
The Hon. Mr. Justice La Forest

Reasons for judgment by:

The Hon. Mr. Justice Le Dain

Concurred in by:

The Rt. Hon. Brian Dickson, P.C.
The Hon. Mr. Justice McIntyre
The Hon. Mme Justice Wilson

Dissenting reasons by:

The Hon. Mr. Justice La Forest

Concurred in by:

The Hon. Mr. Justice Beetz
The Hon. Mr. Justice Lamer

For the appellant:

T.B. Smith, Q.C.
D.R. Kier, Q.C.
Roger Tassé

For the respondent:

Duncan Shaw, Q.C.
Brian D. Gilfillan

For the Attorney General of Quebec:

Odette Laverdière
Alain Gingras

For the Attorney General of British Columbia:

E. Robert A. Edwards, Q.C.

Constitutional law — Distribution of legislative powers — Ocean pollution — Dumping of waste in provincial marine waters — Federal legislation prohibiting dumping of any substance at sea except in accordance with the terms and conditions of a permit — Definition of sea in federal legislation including internal waters of Canada other than fresh waters — Validity of federal legislation — Whether ocean pollution a matter of national concern falling within Parliament's power to legislate in respect of the peace, order and good government of Canada — Ocean Dumping Control Act, S.C. 1974-75-76, c. 55, s. 4(1) — Constitution Act, 1867, s. 91 "preamble", (10), (12).

During the conduct of its logging operations, respondent dumped woodwaste in the waters of Beaver Cove, an area within the province of British Columbia, and was charged with contravening s. 4(1) of the *Ocean Dumping Control Act*. The federal legislation prohibits the dumping of any substance at sea except in accordance with the terms and conditions of a permit, the sea being defined for the purposes of the Act as including the internal waters of Canada other than fresh waters. The respondent had a permit to dump under the Act, but it did not cover this site. The waters of Beaver Cove are navigable and flow into Johnstone Strait which is connected with the Pacific. There was no evidence of any dispersal of the woodwaste or of any effect on navigation or marine life. At trial, the Provincial Court judge dismissed the charges and the appeal by way of stated case was dismissed. Both the trial judge and the Court of Appeal held that s. 4(1) of the Act was ultra vires Parliament. This appeal is to determine whether s. 4(1) of the Act is constitutional in its application to the dumping of waste in waters, other than fresh waters, within a province.

Held (Beetz, Lamer and La Forest JJ. dissenting): The appeal should be allowed.

Per Dickson C.J. and McIntyre, Wilson and Le Dain JJ.: The *Ocean Dumping Control Act* is concerned with the dumping of substances which may be shown or presumed to have an adverse effect on the marine environment and may be characterized as directed to the control or regulation of marine pollution. The federal legislative jurisdiction under s. 91(12) of the *Constitution Act, 1867* with respect to seacoast and inland fisheries is not sufficient by itself to support the constitutional validity of s. 4(1) of the Act because that section, viewed in the context of the Act as a whole, fails to meet the test laid down by this Court in *Fowler v. The Queen*, (1980) 2 S.C.R. 213, and *Northwest Falling Contractors Ltd. v. The Queen*, (1980) 2 S.C.R. 292. While the effect on fisheries of marine pollution caused by the dumping of waste is clearly one of the concerns of the Act, it is not the only effect of such pollution with which the Act is concerned. A basis for federal legislative jurisdiction to control marine pollution generally in provincial waters cannot be found in any of the specified heads of federal jurisdiction in s. 91 of the *Constitution Act, 1867*, whether taken individually or collectively.

Section 4(1) of the *Ocean Dumping Control Act*, however is constitutionally valid as enacted in relation to a matter falling within the national concern doctrine of the peace, order and good government power of the Parliament of Canada. The national concern doctrine, which is separate and distinct from the national emergency doctrine, applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution. In determining whether a matter has the requisite singleness, distinctiveness and indivisibility, it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter. The control of marine pollution meets the test. Marine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole. The pollution of marine waters, including provincial marine waters, by the dumping of substances is sufficiently distinguishable from the pollution of fresh waters by such dumping to meet the requirements of singleness or indivisibility. While in many cases the pollution of fresh waters will have a pollutant effect in the marine waters into which they flow, marine pollution, because of the differences in the composition and action of marine waters and fresh waters, has its own characteristics and scientific considerations that distinguish it from fresh water pollution. Moreover, the distinction between salt water and fresh water as limiting the application of the *Ocean Dumping Control Act* meets the consideration, emphasized by a majority of this Court in the *Anti-Inflation Act* reference, (1976) 2 S.C.R. 373, that in order for a matter to qualify as one of national concern falling within the federal peace, order and good government power it must have ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned.

Per Beetz, Lamer and La Forest JJ. (dissenting): Under its general power respecting peace, order and good government, Parliament may legislate for the control of pollution in areas of the ocean falling outside provincial jurisdiction, and in so doing, Parliament is not confined to regulating activities taking place within those areas. In an application of the doctrine of national dimensions of the general power, Parliament may take steps to prevent activities in a province, such as dumping substances in provincial waters or emitting substances into the air, which pollute or have the potential to pollute the sea outside the province. Parliament's power to control ocean pollution under its general power may also be complemented by provisions made pursuant to the criminal law power. However, while Parliament may undoubtedly prohibit the dumping of anything into federal waters, such prohibitions against dumping substances into provincial waters must be linked to some federal power. Indeed, to respect the scheme of federalism provided by the Constitution, there must be an attempt to link the proscribed conduct and the actual or potential harm to what is sought to be protected — here, the ocean. In the present case, s. 4(1) of the *Ocean Dumping Control Act* was *ultra vires* Parliament as there was no evidence of any such link. The provision was a blanket prohibition against depositing any substance in wastes without regard to its nature or amount.

The control of the environment is not a proper subject for incorporation into the peace, order and good government power under the national dimensions doctrine. All physical activities have some environmental impact. Possible legislative responses to such activities cover a large number of the enumerated legislative powers, federal and provincial. To allocate the broad subject-matter of the environment control to the federal sphere under its general power would effectively gut provincial legislative jurisdiction and sacrifice the principle of federalism enshrined in the Constitution. Further, pollution is not a new phenomenon, and neither are many of the kinds of activities that result in pollution.

The same considerations apply to the creation of an environmental power restricted to the control of ocean pollution. Such subject is not marked by a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. Marine waters are not wholly bounded by the coast and cannot be demarcated clearly. Moreover, the proposed federal power would have an impact on provincial jurisdiction irreconcilable with the division of legislative power under the Constitution. Finally, Parliament already has extensive powers to deal with conditions that lead to ocean pollution wherever they occur. The difficulty with the impunged provision in this case is that it seeks to deal with activities that could not be demonstrated either to pollute or to have a reasonable potential of polluting the ocean. The provision simply overreaches and, in its terms, encompasses activities -- depositing innocuous substances into provincial waters by local undertakings on provincial lands -- that fall within the exclusive legislative jurisdiction of the province. The federal Parliament does not have such wide legislative power over local matters having local import taking place on provincially owned property. The prohibition in essence constitutes an impermissible attempt to control activities on property held to be provincial.

Cases Cited

By Le Dain J.

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By La Forest J. (dissenting)

Fowler v. The Queen, (1980) 2 S.C.R. 213; *Northwest Falling Contractors Ltd. v. The Queen*, (1980) 2 S.C.R. 292; *Interprovincial Co-Operatives Ltd. v. The Queen*, (1976) 1 S.C.R. 477; *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas*, (1984) 1 S.C.R. 388; *Re: Anti-Inflation Act*, (1976) 2 S.C.R. 373; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, (1949) S.C.R. 1; *MacDonald v. Vapor Canada Ltd.* (1977) 2 S.C.R. 134; *Reference re Offshore Mineral Rights of British Columbia*, (1967) S.C.R. 792; *Reference re Newfoundland Continental Shelf*, (1984) 1 S.C.R. 86; *Re Canada Metal Co. and The Queen* (1982), 144 D.L.R. (3d) 124; *Saumur v. City of Quebec*, (1953) 2 S.C.R. 299; *Attorney-General for Canada v. Attorney-General for British Columbia*, (1930) A.C. 111; *In re Regulation and Control of Radio Communication in Canada*, (1932) A.C. 304; *Johannesson v. Municipality of West St. Paul*, (1952) 1 S.C.R. 292; *Munro v. National Capital Commission*, (1966) S.C.R. 663; *R. v. Hauser*, (1979) 1 S.C.R. 984; *Schneider v. The Queen*, (1982) 2 S.C.R. 112.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 91(9), 91(10), 91(12), 91(13), 91(27), 92(5), 92(10), 92(13), 92(16).

Constitution Act, 1871, 34 & 35 Vict., c. 28 (U.K.), s. 4.

Convention on the Law of the Sea (1982).

Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, signed by Canada on December 29, 1972, Art.I, III(3).

Ocean Dumping Control Act, S.C. 1974-75-76, c. 55, ss. 2(1) "Convention", "Dumping", (2), (3), 4(1), (2), 5(2), 9, 10, 13(1)(c), 28(3), Schedules I (am. Sor/81-721), II (am. idem), III.

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APPEAL from a judgement of the British Columbia Court of Appeal (1984), 51 B.C.L.R. 32, 7 D.L.R. (4th) 449, 11 C.C.C. (3d) 113, 13 C.E.L.R. 29, 1984 2 W.W.R. 714, Dismissing an appeal by way of stated case from a judgement of the Provincial court (1982), 11 C.E.L.R. 151, dismissing charges under s. 4(1) of the *Ocean Dumping Control Act*. Appeal allowed, Beetz, Lamer and La Forest JJ. dissenting.

LE DAIN, J.

The question raised by this appeal is whether federal legislative jurisdiction to regulate the dumping of substances at sea, as a measure for the prevention of marine pollution, extends to the regulation of dumping in provincial marine waters. In issue is the validity of s. 4(1) of the *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55, which prohibits the dumping of any substance at sea except in accordance with the terms and conditions of a permit, the sea defined for the purposes of the Act as including the internal waters of Canada other than fresh waters.

The appeal is by leave of this Court from the judgment on January 26, 1984 of the British Columbia Court of Appeal (1984), 51 B.C.L.R. 32, 7 D.L.R. (4th) 449, (1984) 2 W.W.R. 714, 11 C.C.C. (3d) 113, 13 C.E.L.R. 29, dismissing an appeal by way of stated case from the judgment on May 26, 1982 of Schmidt Prov. Ct. J., (1982), 11 C.E.L.R. 151, who dismissed charges against the respondent of unlawfully dumping in the waters of Johnstone Strait near Beaver Cove in the province of British Columbia on the ground that s. 4(1) of the *Ocean Dumping Control Act* is ultra vires the Parliament of Canada.

I

The general purpose of the *Ocean Dumping Control Act* is to regulate the dumping of substances at sea in order to prevent various kinds of harm to the marine environment. The Act would appear to have been enacted in fulfilment of Canada's obligations under the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter*, which was signed by Canada on December 29, 1972. That is not expressly stated in the Act, but there are several references to the Convention in the Act, (see ss. 2(1), 4(2), 5(2), 9(6) and 28(3)), and Schedules I, II and III of the Act, with reference to "Prohibited Substances", "Restricted Substances" and "Factors to be Taken into Account in Granting Permits", appear to be modelled closely on Annexes I, II and III of the Convention. The Schedules of the Act have been amended to incorporate amendments to the Annexes of the Convention (see P.C. 1981-2509, September 16, 1981, SOR/81-721, September 21, 1981).

The concerns of the Act are reflected in the nature of the prohibited and restricted substances in Schedule I and II and in the factors to be taken into account by the Minister of the Environment in granting permits to dump, which are set out in s.s. 9 and 10 of the Act and in Schedule III. What these provisions indicate is that the Act is concerned with marine pollution and its effect on marine life, human health and the amenities of the marine environment. There is also reference to the effect of dumping on navigation and shipping and other legitimate uses of the sea.

Section 4(1) of the Act, with the contravention of which the respondent was charged, reads as follows:

> 4.(1) No person shall dump except in accordance with the terms and conditions of a permit.

"Dumping" is defined by s. 2(1) of the Act as follows:

> 2.(1) In this Act,
>
> ...
>
> "dumping" means any deliberate disposal from ships, aircraft, platforms or other man-made structures at sea of any substance but does not include
>
> (a) any disposal that is incidental to or derived from the normal operations of a ship or an aircraft or of any equipment thereof other than the disposal of substances from a ship or aircraft operated for the purpose of disposing of such substances at sea, and

(b) any discharge that is incidental to or derived from the exploration for, exploitation of and associated off-shore processing of sea bed mineral resources;

"The sea" is defined, for the purposes of the Act, by s. 2(2) and (3) as follows:

(2) For the purposes of this Act, "the sea" means

(a) the territorial sea of Canada;

(b) the internal waters of Canada other than inland waters;

(c) any fishing zones prescribed pursuant to the *Territorial Sea and Fishing Zones Act*;

(d) the arctic waters within the meaning of the *Arctic Waters Pollution Prevention Act*;

(e) any area of the sea adjacent to the areas referred to in paragraphs (a) to (d) as may be prescribed;

(f) any area of the sea, under the jurisdiction of a foreign state, other than internal waters; and

(g) any area of the sea, other than the internal waters of a foreign state, not included in the areas of the sea referred to in paragraphs (a) to (f).

(3) For the purposes of paragraphs (2)(b), "inland waters" means all the rivers, lakes and other fresh waters in Canada and includes the St. Lawrence River as far seaward as the straight lines drawn

(a) from Cap des Rosiers to the western-most point of Anticosti Island; and

(b) from Anticosti Island to the north shore of the St. Lawrence River along the meridian of longitude sixty-three degrees west.

Sections 9 and 10 of the Act respecting the authority of the Minister of the Environment to grant permits to dump read in part as follows:

9.(1) Subject to subsections (4) and (5), the Minister may grant any permit required by this Act upon receipt of an application in prescribed form.

...

(4) No permit may be granted under this section if the dumping or disposal described in the application is prohibited under any other Act of Parliament or if a licence or permit for such dumping or disposal is required under any such other Act and the licence or permit has not been obtained.

(5) No permit may be granted in respect of a substance specified in Schedule I unless, in the opinion of the Minister,

(a) the substance is rapidly rendered harmless by physical, chemical or biological process of the sea and does not render normally edible marine organisms inedible or unpalatable or endanger human or the health of animals;

(b) with respect to any substance specified in items 1 to 5 of that Schedule, such substance is contained in another substance in a quantity or concentration that does not exceed the maximum quantity or concentration prescribed;

(c) the dumping or disposal of a certain quantity of the substance is necessary to avert an emergency that poses an unacceptable risk relating to human health and admits of no other feasible solution; or

(d) where the substance is to be transformed by incineration or other means of thermal degradation, any substance that results from such transformation is

(i) a substance specified in Schedule I in respect of which a permit may be granted by virtue of paragraph (a) or (b), or

(ii) a substance that is not specified in Schedule I.

...

10.(1) Upon receipt of an application the Minister, in determining whether to grant the permit,

(a) shall take into account the factors set out in Schedule III; and

(b) may take into account any other factors that he deems necessary.

(2) A permit shall contain such terms and conditions as the Minister deems necessary in the interest of human life, marine life or any legitimate uses of the sea and, without limiting the generality of the foregoing, may contain terms and conditions relating to such of the following as are applicable:

(a) the nature of the substance that may be dumped or disposed of and the quality thereof;

(b) the method and frequency of dumping or disposal authorized including, if necessary, the date or dates on which dumping or disposal is authorized;

(c) the manner of loading and stowing the substance authorized to be dumped or disposed of;

(d) the site at which dumping or disposal may take place;

(e) the route to be followed by the ship or aircraft transporting the substance to the site of the dumping or disposal; and

(f) any special precautions to be taken respecting the loading, transporting, dumping or disposal of the substance.

...

Schedules I, and II, as amended by P.C. 1981-2509 of September 16, 1981, and Schedule III of the Act are as follows:

SCHEDULE I

PROHIBITED SUBSTANCES

1. Organohalogen compounds.

2. Mercury and mercury compounds.

3. Cadmium and cadmium compounds.

4. Persistent plastics and other persistent synthetic materials.

5. Crude oil and its wastes, refined petroleum products, petroleum distillate residues and any mixtures containing any of those substances.

6. High-level radioactive wastes or other high-level radioactive matter that may be prescribed.

7. Substances in whatever form produced for biological and chemical warfare.

SCHEDULE II

RESTRICTED SUBSTANCES

1. Arsenic and its compounds.

2. Lead and its compounds.

3. Copper and its compounds.

4. Zinc and its compounds.

5. Organosilicon compounds.

6. Cyanides.

7. Fluorides.

8. Pesticides and their by-products not included in Schedule I.

9. Beryllium and its compounds.

10. Chromium and its compounds.

11. Nickel and its compounds.

12. Vanadium and its compounds.

13. Containers and scrap metal.

14. Radioactive wastes or other radioactive matter not included in Schedule I.

15. Substances that by reason of their bulk would interfere with fishing.

16. Substances that, though of a non-toxic nature, may become harmful due to the quantities in which they are dumped, or that are liable to seriously reduce amenities.

SCHEDULE III

FACTORS TO BE TAKEN INTO ACCOUNT IN GRANTING PERMITS

1. Characteristics and composition of substance

    (1) Total amount and average composition of substance dumped (e.g. per year).

    (2) Form (e.g. solid, sludge, liquid or gaseous).

    (3) Properties: physical (e.g. solubility and density), chemical and biochemical (e.g. oxygen demand, nutrients) and biological (e.g. presence of viruses, bacteria, yeasts and parasites).

    (4) Toxicity.

    (5) Persistence: physical, chemical and biological.

    (6) Accumulation and biotransformation in biological materials or sediments.

    (7) Susceptibility to physical, chemical and biochemical changes and interaction in the aquatic environment with other dissolved organic and inorganic materials.

    (8) Probability of production of taints or other changes reducing marketability of resources (fish and shellfish).

2. Characteristics of Dumping Site and Method of Deposit

    (1) Location (e.g. co-ordinates of the dumping site, depth and distance from the coast) and location in relation to other areas (e.g. amenity areas, spawning, nursery and fishing areas and exploitable resources).

    (2) Rate of disposal per specific period (e.g. quantity per day, per week, per month).

(3) Methods of packaging and containment, if any.

(4) Initial dilution achieved by proposed method of release.

(5) Dispersal characteristics (e.g. effects of currents, tides and wind on horizontal transport and vertical mixing).

(6) Water characteristics (e.g. temperature, pH, salinity, stratification, oxygen indices of pollution -- dissolved oxygen (DO), chemical oxygen demand (COD), biochemical oxygen demand (BOD) -- nitrogen present in organic and mineral form including ammonia, suspended matter, other nutrients and productivity).

(7) Bottom characteristics (e.g. topography, geochemical and geological characteristics and biological productivity).

(8) Existence and effects of other dumpings that have been made in the dumping site)e.g. heavy metal background reading and organic carbon content).

(9) In issuing a permit for dumping, consideration should be given whether an adequate scientific basis exists for assessing the consequences of such dumping, as outlined in this Schedule taking into account seasonal variations.

3. General Considerations and Conditions

(1) Possible effects on amenities (e.g. presence of floating or stranded material, turbidity, objectionable odour, discolouration and foaming).

(2) Possible effects on marine life, fish and shellfish culture, fish stocks and fisheries, seaweed harvesting and culture.

(3) Possible effects on other uses of the sea (e.g. impairment of water quality for industrial use, underwater corrosion of structures, interference with ship operations from floating substances, interference with fishing or navigation through deposit of waste or solid objects on the sea floor and protection of areas of special importance for scientific or conservation purposes).

(4) The practical availability of alternative land based methods of treatment, disposal or elimination, or of treatment to render the matter less harmful for dumping at sea.

Section 13(10) of the Act provides:

13.(1) Every person who contravenes section 4, 5 or 6 is guilty of an offence and is liable on summary conviction to a fine not exceeding

(a) one hundred thousand dollars, where the offence involves a substance specified in Schedule I;

(b) seventy-five thousand dollars, where the offence involves a substance specified in Schedule II, or

(c) fifty thousand dollars, where the offence involves any substance not specified in Schedule I or II.

The respondent was charged, in an information consisting of two counts, with contravening s. 4(1) of the Act, and thereby committing an offence under s. 13(1)(c) as follows:

Count 1: On or about the 16th day of August, A.D. 1980, in the waters of Johnstone Strait near Beaver Cove, Province of British Columbia, did unlawfully dump except in accordance with the terms and conditions of a permit in contravention of Section 4 of the Ocean Dumping Control Act, thereby committing an offence under Section 13(1)(c) of the said Act.

Count 2: On or about the 17th day of August, A.D. 1980, in the waters of Johnstone Strait near Beaver Cove, Province of British Columbia, did unlawfully dump except in accordance with the terms and conditions of a permit in contravention of Section 4 of the Ocean Dumping Control Act, thereby committing an offence under Section 13(1)(c) of the said Act.

The admitted facts concerning the location and nature of the dumping with which the respondent was charged are as follows. The respondent carries on logging operations on Vancouver Island in connection with its forest products business in British Columbia and maintains a log dump on a water lot leased from the provincial Crown for the purpose of log booming and storage in Beaver Cove, off Johnstone Strait, on the northeast side of Vancouver Island. The waters of Beaver Cove are *inter fauces terrae*, or as put in the stated case, "Beaver Cove is of such size that a person standing on the shoreline of either side of Beaver Cove can easily and reasonably discern between shore and shore of Beaver Cove". On August 16 and 17, 1980 the respondent, using an 80-foot crane operating from a moored scow, dredged woodwaste from the ocean floor immediately adjacent to the shoreline at the site of its log dump in Beaver Cove and deposited it in the deeper waters of the cove approximately 60 to 80 feet seaward of where the woodwaste had been dredged. The purpose of the dredging and dumping was to allow a new A-frame structure for log dumping to be floated on a barge to the shoreline for installation there and to give clearance for the dumping of bundled logs from the A-frame structure into the waters of the log dump area. The woodwaste consisted of waterlogged logging debris such as bark, wood and slabs. There is no evidence of any dispersal of the woodwaste or any effect on navigation or marine life. At the relevant time the only permit held by the respondent under the Act was one issued on or about July 28, 1980, effective until July 25, 1981, to dump at a site in Johnstone Strait some 2.2 nautical miles from the place where the woodwaste was dumped.

In the Provincial Court of British Columbia, Schmidt Prov. Ct. J. found that the waters of Beaver Cove in which the woodwaste was dumped are within the province of British Columbia. In support of this finding he referred to the judgment of the British Columbia Court of Appeal in *Reference Re Ownership of the Bed of the Strait of Georgia and Related Areas* (1977), 1 B.C.L.R. 97, in which a majority of the Court held that the waters of Johnstone Strait, of which Beaver Cove forms part, are within British Columbia. (An appeal from this judgment was subsequently dismissed by this Court in *Reference Re Ownership of the Bed of the Strait of Georgia and Related Areas*, (1984) 1 S.C.R. 388.) Schmidt Prov. Ct. J. held that the regulation of the dumping of woodwaste in the respondent's log dump areas in Beaver Cove, as part of the respondent's logging operations, fell within provincial legislative jurisdiction under head 92(5) of the

Constitution Act, 1867 -- "The Management and Sale of Public Lands belonging to the Province and of the Timber and Wood thereon". He further held that the regulation of such dumping did not fall within federal legislative jurisdiction under head 91(10) -- "Navigation and Shipping" -- or under head 91(12) -- "Sea Coast and Inland Fisheries". Applying this Court's judgment in *Fowler v. The Queen*, (1980) 2 S.C.R. 213, he concluded that s. 4(1) of the Act "makes no attempt to link the proscribed conduct to actual or potential harm to fisheries or to interference with navigation or shipping." Finally, Schmidt Prov. Ct. J. rejected the respondent's contention that the Parliament of Canada had legislative jurisdiction to enact s. 4(1) under its treaty implementation power. Applying what was said by Laskin C.J. in *MacDonald v. Vapor Canada Ltd.*, (1977) 2 S.C.R. 134, he held that there was not a sufficiently clear indication in the Act that it was enacted in implementation of the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*. In the result, Schmidt Prov. Ct. J. held s. 4(1) of the Act to be *ultra vires* the Parliament of Canada and dismissed the charges against the respondent.

The appeal by way of stated case from this judgment was dismissed by unanimous judgment of the British Columbia Court of Appeal (Carrothers, Aikens and Macdonald JJ.A). Macdonald J.A., delivering the judgment of the Court, rejected the appellant's contentions based on federal jurisdiction with respect to navigation and shipping and seacoast and inland fisheries for the same reason as that adopted by Schmidt Prov. Ct. J. Applying the judgments of this Court in *Fowler, supra*, and *Northwest Falling Contractors Ltd. v. The Queen*, (1980) 2 S.C.R. 292, he concluded that the Act made no attempt to link the proscribed conduct to actual or potential harm to navigation or fisheries and this failed to meet the test laid down in those cases. Macdonald J.A. also rejected the appellant's contention based on federal jurisdiction to implement treaties, in reliance on what was said by Laskin C.J. in *Macdonald v. Vapor Canada Ltd.*, supra. Macdonald J.A. held that the dumping of substances in Beaver Cove was a matter that fell within provincial legislative jurisdiction under heads 92(5), 92(13) and 92(16) of the *Constitution Act, 1867*. He rejected the contention that it was part of a new matter, referred to as pollution of the sea, which did not exist at the time of Confederation, and not being a matter of a merely local or private nature on the province, fell within the peace, order and good government power of the Parliament of Canada on the authority of the judgment of this Court in *R. v. Hauser*, (1979) 1 S.C.R. 984.

On the appeal to this Court the constitutional question was framed as follows:

> Is Section 4(1) of the *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55, *ultra vires* of the Parliament of Canada, and, in particular, is it *ultra vires* of the Parliament of Canada in its application to the dumping of waste in the waters of Beaver Cove, an area within the Province of British Columbia?

II

As the constitutional question indicates, the issue raised by the appeal is the constitutionality of the application of s. 4(1) of the Act to the dumping of waste in waters, other than fresh waters, within a province. The respondent concedes, as it must, that Parliament has jurisdiction to regulate dumping in waters lying outside the territorial limits of any province. It also concedes that Parliament has jurisdiction to regulate the dumping of substances in provincial waters to prevent pollution of those waters that is harmful to fisheries, if the federal legislation meets the test laid down in the *Fowler* and *Northwest Falling* cases. It further concedes, in view of the opinion expressed in this

Court in *Interprovincial Co-operatives Ltd.* v. *The Queen*, (1976) 1 S.C.R. 477, that Parliament has jurisdiction to regulate the dumping in provincial waters of substances that can be shown to cause pollution in extra-provincial waters. What the respondent challenges is federal jurisdiction to control the dumping in provincial waters of substances that are not shown to have a pollutant effect in extra-provincial waters. The respondent contends that on the admitted facts that is precisely the present case. The respondent submits that in so far as s. 4(1) of the Act can only be read as purporting to apply to such dumping it is *ultra vires* and, alternatively, that it should be read, if possible, so as not to apply to such dumping. In either case the appeal must fail. The Attorney General of British Columbia, who supported the attack on s. 4(1), as applied to the dumping of waste in Beaver Cove, and with whom the Attorney General of Quebec agreed, made a similar submission that s. 4(1) should be read down so as not to apply to dumping in provincial waters. He submitted that the consitutional question should be answered as follows: "Section 4(1) of the *Ocean Dumping Control Act* is constitutionally inapplicable to marine waters within a province and, therefore, the definition of 'the sea' in s. 2(2) of the Act must be read to exclude from the term 'internal waters of Canada' in paragraph (b) those internal waters which are within a province."

In this Court the Attorney General of Canada did not contend that there was a sufficient connection between the Act and navigation to support the validity of s. 4(1) on the basis of federal jurisdiction with respect to navigation and shipping. He did submit, as I understood his argument, that there was a sufficient connection between the Act and the protection of fisheries to meet the test laid down in *Fowler* and *Northwest Falling*, but I did not understand him to place very great reliance on this submission. His principal submission in this Court was that the control of dumping in provincial marine waters, for the reasons indicated in the Act, was part of a single matter of national concern or dimension which fell within the federal peace, order and good government power. He characterized this matter as the prevention of ocean or marine pollution. His reliance on the specific heads of federal jurisdiction with respect to navigation and shipping and seacoast and inland fisheries, as well as others of a maritime nature, was rather as indicating, in his submission, the scope that should be assigned to federal jurisdiction under the peace, order and good government power to regulate the dumping of substances for the prevention of marine pollution. The Attorney General of Canada made it plain that he was not relying in this Court on ancillary or necessarily incidental power. His contention was that the control of dumping in provincial marine waters was an integral part of a single matter of national concern. Nor did he rely in this Court on the peace, order and good government power as a basis of federal jurisdiction to enact the *Ocean Dumping Control Act* in implementation of the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*. He referred to the Convention and its Annexes as indicating the mischief to which the Act is directed and as supporting his characterization of the matter in relation to which the Act was enacted. In his factum the Attorney General of Canada also placed some reliance on the federal criminal law power under s. 91(27) of the *Constitution Act*, 1867, as a constitutional basis for the enactment of s. 4(1) of the Act as a measure for the prevention of injury to public health, but I did not understand him to press this contention in his oral argument.

Before considering the relationship of the subject-matter of the Act to the possible bases of federal legislative jurisdiction something more should be said about the characterization of that subject-matter, according to the respective contentions of the parties. As I have indicated, the appellant contends that the Act is directed to the control or regulation of marine pollution, the subject-matter of the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*. The respondent, on the other hand, contends that by its terms the Act is directed at dumping which need not necessarily have a pollutant effect. It prohibits the dumping of any substance, including a substance not specified in Schedule I or Schedule II, except in accordance with the terms and conditions of a permit. In my opinion, despite this apparent scope, the Act, viewed as a whole, may be properly characterized as directed to the control or regulation of marine pollution, in so far as that may be relevant to the question of legislative jurisdiction. The chosen, and perhaps only effective, regulatory model makes it necessary, in order to prevent marine pollution, to prohibit the dumping of any substance without a permit. Its purpose is to require a permit so that the regulatory authority may determine before the proposed dumping has occurred whether it may be permitted upon certain terms and conditions, having regard to the factors or concerns specified in ss. 9 and 10 of the Act and Schedule III. The Act is concerned with the dumping of substances which may be shown or presumed to have an adverse effect on the marine environment. The Minister and not the person proposing to do the dumping must be the judge of this, acting in accordance with the criteria or factors indicated in ss. 9 and 10 and Schedule III of the Act. There is no suggestion that the Act purports to authorize the prohibition of dumping without regard to perceived adverse effect or the likelihood of such effect on the marine environment. The nature of the marine environment and its protection from adverse effect from dumping is a complex matter which must be left to expert judgment.

III

Before considering the application of the federal peace, order and good government power it is necessary to express an opinion as to the effect of the judgments of this Court in *Fowler and Northwest Falling*, because of the particular reliance that was placed on them in the judgments below and in the argument of the respondent and the provincial Attorneys General in this Court.

Fowler was concerned with the validity of s. 33(3) of the *Fisheries Act*, R.S.C. 1970, c. F-14, which provided: "No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water". Martland J., delivering the unanimous judgment of the Court, referred to the authorities on the nature and scope of federal legislative jurisdiction with respect to seacoast and inland fisheries as indicating that such jurisdiction is concerned with the protection and preservation of fisheries as a public resource, and to definitions of a fishery as indicating both the right of catching fish and the place where the right may be exercised. He then said at p. 224:

> The legislation in question here does not deal directly with fisheries, as such, within the meaning of those definitions. Rather, it seeks to control certain kinds of operations not strictly on the basis that they have deleterious effects on fish but, rather, on the basis that they might have such effects. *Prima facie*, subs. 33(3) regulates property and civil rights within a province. Dealing, as it does, with such rights and not dealing specifically with "fisheries", in order to support the legislation it must be established that it provides for matters necessarily incidental to effective legislation on the subject-matter of sea coast and inland fisheries.

After emphasizing the very broad scope of s. 33(3), as covering "not only water frequented by fish but also water that flows into such water, ice over any such water and any place from which slash, stumps and other debris are likely to be carried into such water", Martland J. concluded as follows at p. 226:

> Subsection 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries. Furthermore, there was no evidence before the Court to indicate that the full range of activities caught by the subsection do, in fact, cause harm to fisheries. In my opinion, the prohibition in its broad terms is not necessarily incidental to the federal power to legislate in respect of sea coast and inland fisheries and is *ultra vires* of the federal Parliament.

Northwest Falling concerned the validity of s. 33(2) of the *Fisheries Act*, which provided: "subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water." A "deleterious substance" was defined as one that would so affect the quality of water as to render it "deleterious to fish or fish habitat or to the use by man of fish that frequent that water." The validity of s. 33(2) was attacked on the ground, among others, that it was in relation to the pollution of water generally. The Court held that s. 33(2) was *intra vires* as legislation "aimed at the protection and preservation of fisheries" and distinguishable in this respect from s. 33(3), which had been declared to be *ultra vires* in *Fowler*. Martland J., again delivering the unanimous judgment of the Court, distinguished the two subsections as follows at p. 301:

> Unlike subs (2), subs. (3) contains no reference to deleterious substances. It is not restricted by its own terms to activities that are harmful to fish or fish habitat. The basis of the judgment in the *Fowler* case is set out in the following passage:
>
> Subsection 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries.
>
> In my opinion, subs 33(2) was *intra vires* of the Parliament of Canada to enact. The definition of "deleterious substances" ensures that the scope of subs 33(2) is restricted to a prohibition of deposits that threaten fish, fish habitat or the use of fish by man.

I agree with Schmidt Prov. Ct. J. and the British Columbia Court of Appeal that federal legislative jurisdiction with respect to seacoast and inland fisheries is not sufficient by itself to support the constitutional validity of s. 4(1) of the Act because that section, viewed in the context of th Act as a whole, fails to meet the test laid down in *Fowler* and *Northwest Falling*. While the effect on fisheries of marine pollution caused by the dumping of waste is clearly one of the concerns of the Act it is not the only effect of such pollution with which the Act is concerned. A basis for federal legislative jurisdiction to control marine pollution generally in provincial waters cannot be found in any of the specified heads of federal jurisdiction in s. 91 of the *Constitution Act, 1867*, whether taken individually or collectively.

IV

It is necessary then to consider the national dimensions or national concern doctrine (as it is now generally referred to) of the federal peace, order and good government power as a possible basis for the constitutional validity of s. 4(1) of the Act, as applied to the control of dumping in provincial marine waters.

The national concern doctrine was suggested by Lord Watson in the *Local Prohibition case (Attorney-General for Ontario v. Attorney-General for Canada,* (1896) A.C. 348) and given its modern formulation by Viscount Simon in Attorney-General for *Ontario v. Canada Temperance Federation,* (1946) A.C. 193. In *Local Prohibition,* Lord Watson said at p. 361:

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local or provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.

In *Canada Temperance Federation,* Viscount Simon said at pp. 205-6:

> In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case and the *Radio* case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms. In *Russell v. The Queen,* Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province.

This Court's conception of the national concern doctrine of the federal peace, order and good government power, as enunciated in Canada Temperance Federation, is to be derived from the consideration or application given to the doctrine in the following cases: *Johannesson v. Municipality of West St. Paul,* (1952) 1 S.C.R. 292; *Munro v. National Capital Commission,* (1966) S.C.R. 663; *Re Anti-Inflation Act,* (1976) 2 S.C.R. 373; *R. v. Hauser,* supra; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada,* (1980) 1 S.C.R. 9141 *Schneider v. The Queen,* (1982) 2 S.C.R. 112; and R. v. *Wetmore,* (1983) 2 S.C.R. 284.

The national concern doctrine, as enunciated in *Canada Temperance Federation,* was referred to with approval by a majority of this Court in *Johannesson* as supporting exclusive federal legislative jurisdiction with respect to the whole field of aeronautics. In *Munro*, where the *National Capital Act* was upheld on the basis of the federal peace, order and good government power, Cartwright J., delivering the unanimous judgment of the Court said that the national concern doctrine had been adopted by this Court in *Johannesson* and that the development of the National Capital Region was "a single matter of national concern".

The national concern doctrine was the subject of important commentary in this Court in the *Anti-Inflation Act* reference. A majority of the Court (Laskin C.J., and Martland, Judson, Ritchie, Spence, Pigeon and Dickson JJ.) upheld the Act on the basis of the emergency doctrine of the federal peace, order and good government power as legislation required to meet a "crisis" (the word used by Laskin C.J.) or "national emergency" (the words used by Ritchie J.). In the course of a comprehensive review of the judicial decisions with respect to the federal peace, order and good government power, Laskin C.J., with whom Judson, Spence and Dickson JJ. concurred, referred, with implicit approval, to the dictum of Viscount Simon in *Canada Temperance Federation*, but indicated that if he found, as he did, that the Act was valid on the basis of the emergency doctrine, as "crisis" legislation, he did not intend to express an opinion as to its possible validity on the basis of the national concern doctrine, on which the Attorney General of Canada had principally relied. He said at p. 419: "If it is sustainable at crisis legislation, it becomes unnecessary to consider the broader ground advanced in its support, and this because, especially in constitutional cases, Courts should not, as a rule, go any farther than is necessary to determine the main issue before them". He indicated, however, that he did not think it wise to attempt to define the scope of the federal peace, order and good government power in such precise or fixed terms as to make it incapable of application to changing or unforeseen circumstances. There is, moreover, a hint that he was disposed to seek a unified theory of the peace, order and good government power and that he regarded the emergency doctrine as a particular application of the national concern doctrine. Referring to the use of the word "emergency" in *Fort Frances Pulp & Power Co. Ltd.* v. *Manitoba Free Press Co. Ltd.*, (1923) A.C. 695, he said at p. 407: "Here then was a particular application of what Lord Watson said in the Local Prohibition case ..."

Ritche J., with whom Martland and Pigeon JJ. concurred, held that the validity of the Act could rest only on the emergency doctrine of the peace, order and good government power and that the national concern doctrine, in the absence of national emergency, could not give Parliament jurisdiction with respect to matters which would otherwise fall within provincial legislative jurisdiction. He said that he was in agreement with what was said by Beetz J. with reference to the national concern doctrine. Beetz J., with whom de Grandpré J. concurred, was obliged to consider the contention based on the national concern doctrine because he was of the view that the validity of the *Anti-Inflation Act* could not be supported on the basis of national emergency. He held that the national concern doctrine applied, in the absence of national emergency, to single, indivisible matters which did not fall within any of the specified heads of provincial or federal legislative jurisdiction. He held that the containment and reduction of inflation did not meet the test of singleness or indivisibility. Referring to aeronautics, radio and the development of the National Capital Region as distinct matters of national concern, he said at p. 458:

> I fail to see how the authorities which so decide lend support to the first submission. They had the effect of adding by judicial process new matters or new classes or matters to the federal list of powers. However, this was done

> only in cases where a new matter was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form. The scale upon which these new matters enabled Parliament to touch on provincial matters had also to be taken into consideration before they were recognized as federal matters: if an enumerated federal power designated in broad terms such as the trade and commerce power had to be construed so as not to embrace and smother provincial powers (*Parson's* case) and destroy the equilibrium of the Constitution, the Courts must be all the more careful not to add hitherto unnamed powers of a diffuse nature to the list of federal powers.
>
> The "containment and reduction of inflation" does not pass muster as a new subject matter. It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory.
>
> I should add that inflation is a very ancient phenomenon, several thousands years old, as old probably as the history of currency. The Fathers of Confederation were quite aware of it.

In *Hauser* a majority of the Court (Martland, Ritchie, Pigeon and Beetz JJ.) held that the constitutional validity of the *Narcotic Control Act* rested on the peace, order and good government power of Parliament rather than on its jurisdiction with respect to criminal law. Pigeon J., who delivered the judgement of the majority, said that the principal consideration in support of this view was that the abuse of narcotic drugs, with which the Act dealt, was a new problem which did not exist at the time of Confederation, and that since it did not come within matters of a merely local or private nature in the province it fell within the "general residual power" in the same manner as aeronautics and radio.

In *Labatt Breweries*, in which a majority of the full Court held that certain provisions of the Food and Drugs Act and regulations thereunder were ultra vires, Estey J., with whom Martland, Dickson and Beetz JJ. concurred, had occasion to consider the peace, order and good government power as a possible basis of validity. He summed up the doctrine with respect to that basis of federal legislative jurisdiction as falling into three categories: (a) the cases "basing the federal competence on the existence of a national emergency"; (b) the cases in which "federal competence arise because the subject matter did not exist at the time of Confederation and clearly cannot be put into the class of matters of a merely local or private nature", of which aeronautics and radio were cited as examples; and (c) the cases in which "the subject matter 'goes beyond local or provincial concern or interest and must, from its inherent nature, be the concern of the Dominion as a whole'", citing *Canada Temperance Federation*. Thus Estey J. saw the national concern doctrine enunicated in *Canada Temperance Federation* as covering the case, not of a new subject matter which did not exist at Confederation, but of one that may have begun as a matter of a local or provincial concern but had become one of national concern. He referred to that category as "a matter of national concern transcending the local authorities' power to meet and solve it by legislation", and quoted in support of this statement of the test a passage from Professor Hogg's *Constitutional Law of Canada* (1977), at p. 261, in which it was said that "the most important element of national dimension or national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it grave consequences for the residents of other provinces."

In *Schneider*, in which the Court unanimously held that the *Heroin Treatment Act* of British Columbia was *intra vires*, Dickson J. (as he then was), with whom Martland, Ritchie, Beetz, McIntyre, Chouinard and Lamer JJ. concurred, indicated, with particular reference to the national concern doctrine and what has come to be known as the "provincial inability" test, why he was of the view that the treatment of heroin dependency, as distinct from the traffic in narcotic drugs, was not a matter falling within the federal peace, order and good government power. He referred to the problem of heroin dependency as follows at pp. 131-32.

> It is largely a local or provincial problem and not one which has become a matter of national concern, so as to bring it within the jurisdiction of the Parliament of Canada under the residuary power contained in the opening words of the *B.N.A. Act* (now, *Constitution Act, 1867).*
>
> There is no material before the Court leading one to conclude that the problem of heroin dependency as distinguised from illegal trade in drugs is a matter of national interest and dimension transcending the power if each province to meet and solve its own way. It is not a problem which "is beyond the power of the provinces to deal with" (Professor Gibson (1976-77), 7 Man. LJ. 15, at p. 33). Failure by one province to provide treatment facilities will not endanger the interests of another province. The subject is not one which "has attained such dimensions as to affect the body politics of the Dominion" (In *re Regulation and Control of Aeronautics in Canada*, (1932) A.C. 54, at p. 77). It is not something that "goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case and the *Radio* case)" per Viscount Simon in *Attorney-General for Ontario v. Canada Temperance Federation*, (1946) A.C. 193, at p. 205. See also *Johanesson v. Rural Municipality of West St. Paul*, (1952) 1 S.C.R. 292; *Munro v. National Capital Commission*, (1966) S.C.R. 663; *Re C.F.R.B. and Attorney General for Canada*, (1973) 3 O.R. 819. Nor can it be said, on the record, that heroin addiction has reached a state of emergency as will ground federal competence under residual power.
>
> I do not think the subject of narcotics is so global and indivisible that the legislative domain cannot be divided, illegal trade in narcotics coming within the jurisdiction of the Parliament of Canada and the treatment of addicts under provincial jurisdiction.

In *Wetmore*, where the issue was whether the federal Attorney General was entitled to conduct the prosecution of charges for violation of the *Food and Drugs Act*, Dickson J., dissenting considered whether the applicable provisions of the *Food and Drugs Act* had their constitutional foundation in the federal criminal law power, or as was held in *Hauser* with respect to the *Narcotics Control Act*, in the peace, order and good government power. In rejecting the latter basis of jurisdiction, he referred to what was said concerning the national concern doctrine of the peace, order and good government power in the *Anti-Inflation Act* reference, *Labatt and Hauser* as follows at pp. 294-95:

> In the *Reference re Anti-Inflation Act*, (1976) 2 S.C.R. 373, Beetz J., whose judgment on this point commanded majority support, reviewed the extensive jurisprudence on the subject and concluded that the peace, order and good government power should be confined to justifying (i) temporary legislation dealing with a national emergency (p. 459) and (ii) legislation dealing with "distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern" (p. 457). In the *Labatt* case, *supra*, at pp. 944-45, Estey J. divided this second heading into (i) areas in which the federal competence arises because the subject matter did not exist at the time of Confederation and cannot be classified as of a merely local and private nature and (ii) areas where the subject matter "goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole". This last category is the one enunciated by Viscount Simon in *Attorney-General for Ontario* v. *Canada Temperance Federation*, (1946) A.C. 193, at p. 205. The one preceding it formed the basis of the majority decision in Hauser that the *Narcotic Control Act*, R.S.C. 1970, c. N-1, came under the peace order and good government power as dealing with "a genuinely new problem which did not exist at the time of Confederation".

Applying these principles to the subject matter of the *Food and Drugs Act*, Dickson J. noted that there was no question of emergency or of a new matter that did not exist at Confederation and rejected the national concern doctrine of the peace, order and good government as a basis for the constitutional validity of the provisions in question for the following reasons at p. 296:

> Finally, it cannot be maintained that ss. 8(a), 9(1) and 26 address a subject that goes beyond local or provincial interest and must from its intrinsic nature be the concern of the Dominion as a whole, as that concept has been interpreted in the cases. Their subject matter would clearly not satisfy the requirements cited by Beetz J. in the *Reference re Anti-Inflation Act, supra*, nor would it come within the criteria proposed by Hogg, *Constitutional Law of Canada* (1977), at p. 262, in a passage cited by Estey J. in *Labatt, supra*, at p. 945:
>
> > These cases suggest that the most important element of national dimension or national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to co-operate would carry with it grave consequences for the residents of other provinces. A subject matter of legislation which has this characteristic has the necessary national dimension or concern to justify invocation of the p.o.g.g. power.
>
> The same factors that prevent s. 8(a) and s. 9(1) from qualifying as "general regulation of trade affecting the whole Dominion" also stand in the way of characterizing them as legislation in relation to peace, order and good government under the *Canada Temperance* test. Aside from the purported application throughout Canada and from certain financial and logistical difficulties in enacting comparable provincial legislation, there is nothing inherently "national" in these sections. And as is demonstrated by a line of cases stretching from *Re Insurance Act* 1910 (1913), 48 S.C.R. 260, affirmed (sub. nom. *Attorney-General for Canada* v. *Atorney-General for Alberta (Insurance Reference))*, (1916) 1 A.C. 588 to the *Labatt* case, *supra*, neither of

> these criteria separately or together is sufficient to validate a federal enactment under the peace, order and good government power.

From this survey of the opinion expressed in this Court concerning the national concern doctrine of the federal peace, order and good government power I draw the following conclusions as to what now appears to be firmly established:

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;

2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;

3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;

4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.

This last factor, generally referred to as the "provincial inability" test and noted with apparent approval in this Court in *Labatt*, *Schneider* and *Wetmore*, was suggested, as Professor Hogg acknowledges, by Professor Gibson in his article, "Measuring 'National Dimensions'", (1976) 7 *Man. L.J.* 15, as the most satisfactory rationale of the cases in which the national concern doctrine of the peace, order and good government power has been applied as a basis of federal jurisdiction. As expounded by Professor Gibson, the test would appear to involve a limited or qualified application of federal jurisdiction. As put by Professor Gibson at pp. 34-35, "By this approach, a national dimension would exist whenever a significant aspect of a problem is beyond provincial reach because it falls within the jurisdiction of another province or of the federal Parliament. It is important to emphasize however that the entire problem would not fall within federal competence in such circumstances. Only that aspect of the problem that is beyond provincial control would do so. Since the "P.O. & G.G." clause bestows only residual powers, the existence of a national dimension justifies, no more federal legislation than is necessary to fill the gap in provincial powers. For example, federal jurisdiction to legislate for pollution of interprovincial waterways or to control "pollution price-wars" would (in the absence of other independent sources of federal competence) extend only to measures to reduce the risk that citizens of one province would be harmed by the non co-operation of another province or provinces". To similar effect, he said in his conclusion at p. 36: "Having regard to the residual nature of the power, it is the writer's thesis that 'national dimensions' are possessed by only those aspects of legislative problems which are beyond the ability of the provincial legislatures to deal because they involve either federal competence or that of another province. Where it would be possible to deal fully with the problem by co-operative action of two or more legislatures, the "national dimension" concerns only the risk of non-co-operation, and justifies only federal legislation addresses to that risk." This would appear to contemplate a concurrent or overlapping federal jurisdiction which, I must observe, is in conflict with what was emphasized by Beetz J. in the *Anti-Inflation Act Reference* -- that where a matter falls within the national concern doctrine of the peace, order and good government power, as distinct from the emergency doctrine, Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects.

As expressed by Professor Hogg in the first and second editions of his *Constitutional Law of Canada*, the "provincial inability" test would appear to be adopted simply as a reason for finding that a particular matter is one of national concern falling within the peace, order and good government power: that provincial failure to deal effectively with the intra-provincial aspects of the matter could have an adverse effect on extra-provincial interests. In this sense, the "provincial inability" test is one of the indicia for determining whether a matter has that character of singleness or indivisibility required to bring it within the national concern doctrine. It is because of the interrelatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative treatment. The "provincial inability" test must not, however, go so far as to provide a rationale for the general notion, hitherto rejected in the cases, that there must be a plenary jurisdiction in one order of government or the other to deal with any legislative problem. In the context of the national concern doctrine of the peace, order and good government power, its utility lies, in my opinion, in assisting in the determination whether a matter has the requisite singleness or indivisibility from a functional as well as a conceptual point of view.

Before turning to the question whether the pollution caused by the dumping of substances in marine waters, including those within a province, has the required singleness or indivisibility to fall within the national concern doctrine of the peace, order and good government power, some further reference should be made to the opinion expressed by three members of this Court in *Interprovincial Co-Operatives* concerning federal jurisdiction with respect to the pollution of inter-provincial rivers, because of the particular reliance placed on it by the Attorney-General of Canada. That case concerned the validity of *The Fishermen's Assistance and Polluters' Liability Act* of Manitoba, which created a statutory liability for damage caused to fisheries in the waters of the province by a contaminant discharged without lawful excuse into waters outside the province and carried by them into waters in the province. The Act further provided that is was not a lawful excuse for the discharge of a contaminant "that the discharge of the contaminant was permitted by the appropriate regulatory authority having jurisdiction at the place where the discharge occurred, if that regulatory authority did not also have jurisdiction at the place where the contaminant caused damage to the fishery". An action was brought for damage caused to fisheries in Manitoba by mercury discharged in waters in Saskatchewan and Ontario and carried by the natural flow of those water into waters in Manitoba. Pigeon J., with whom Martland and Beetz JJ. concurred, held that it was beyond the legislative competence of the province to create a statutory right of action for damage caused in the province by acts outside of the province, just as it was beyond the jurisdiction of a province to authorize acts in the province which caused damage in another province. Observing that "Here, we are faced with a pollution problem that is not really local in scope but truly interprovincial", Pigeon J. held that control of the pollution of interprovincial rivers fell within the residuary jurisdiction of Parliament under the peace, order and good government power. Because of the nature of the Manitoba legislation and the facts of the case, I think it must be assumed, as submitted by the respondent, that in referring to the pollution of interprovincial rivers Pigeon J. had in mind pollution that crossed provincial boundaries. Moreover, the opinion that there was federal jurisdiction based on the peace, order and good government power to control the pollution of interprovincial rivers was not that of a majority of the Court. Ritchie J., the other member of the majority in favour of allowing the appeal, was of the view that the Manitoba statute was inapplicable to the defendants, in so far as it sought to deny a right arising outside of the province, but he declined to hold, with Pigeon J., that it was *ultra vires* as being in relation to a matter within federal jurisdiction, a point which he said had not been argued. In the course of his reasons he did express the opinion that Parliament had jurisdiction to control pollution in interprovincial rivers but he referred only to s. 91(12) of the *Constitution Act, 1867* as the basis if such jurisdiction.

V

Marine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole. The question is whether the control of pollution by the dumping of substances in marine waters, including provincial marine waters, is a single, indivisible matter, distinct from the control of pollution by the dumping of substances in other provincial waters. *The Ocean Dumping Control Act* reflects a distinction between the pollution of salt water and the pollution of fresh water. The question, as I conceive it, is whether that distinction is sufficient to make the control of marine pollution by the dumping of substances a single, indivisible matter falling within the national concern doctrine of the peace, order and good government power.

Marine pollution by the dumping of substances is clearly treated by the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* as a distinct and separate form of water pollution having its own characteristics and scientific considerations. This impression is reinforced by the United Nations Report of the Joint Group of Experts on the Scientific Aspects of Marine Pollution, Reports and Studies No. 15, *The Review of The Health of the Ocean* (UNESCO 1982) (hereinafter referred to as the "United Nations Report"), which forms part of the materials placed before the Court in the argument. It is to be noted, however, that, unlike the *Ocean Dumping Control Act*, the Convention does not require regulation of pollution by the dumping of waste in the internal marine waters of a state. Article III, para. 3, of the Convention defines the "sea" as "all marine waters other than the internal waters of the States." The internal marine waters of a state are those which lie landward of the baseline of the territorial sea, which is determined in accordance with the rules laid down in the *United Nations Convention on the Law of the Sea* (1982). The limitation of the undertaking in the Convention, presumably for reasons of state policy, to the control of dumping in the territorial sea and the open sea cannot, in my opinion, obscure the obviously close relationship, which is emphasized in the United Nations Report, between pollution in coastal waters, including the internal marine waters of a state, and pollution in the territorial sea. Moreover, there is much force, in my opinion, in the appellant's contention that the difficulty of ascertaining by visual observation the boundary between the territorial sea and the internal marine waters of a state creates an unacceptable degree of uncertainty for the application of regulatory and penal provisions. This, and not simply the possibility or likelihood of the movement of pollutants across that line, is what consitutes the essential indivisibility of the matter of marine pollution by the dumping of substances.

There remains the question whether the pollution of marine waters by the dumping of substances is sufficiently distinguishable from the pollution of fresh waters by such dumping to meet the requirement of singleness or indivisibility. In many cases the pollution of fresh waters will have a pollutant effect in the marine waters into which they flow, and this is noted by the United Nations Report, but that report, as I have suggested, emphasizes that marine pollution, because of the differences in the composition and action of marine waters and fresh waters, has its own characteristics and scientific considerations that distinguish it from fresh water pollution. Moreover, the distinction between salt water and fresh water as limiting the application of the *Ocean Dumping Control Act* meets the consideration emphasized by a majority of this Court in the *Anti-Inflation Act* reference -- that in order for a matter to qualify as one of national concern falling within the federal peace, order and good government power it must have ascertainable and reasonable limits, in so far as impact on provincial jurisdiction is concerned.

For these reasons I am of the opinion that s. 4(1) of the *Ocean Dumping Control Act* is constitutionally valid as enacted in relation to a matter falling within the national concern doctrine of the peace, order and good government power of the Parliament of Canada, and, in particular, that it is constitutional in its application to the dumping of waste in the waters of Beaver Cove. I would accordingly allow the appeal, set aside the judgements of the Court of Appeal and Schmidt Prov. Ct. J. and refer the matter back to the Provincial Court judge. The constitutional question should be answered as follows:

> Is Section 4(1) of the *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55, *ultra vires* of the Parliament of Canada, and, in particular, is it *ultra vires* of the Parliament of Canada in its application to the dumping of waste in the waters of Beaver Cove, an area within the Province of British Columbia?
>
> Answer: No.

SUPREME COURT OF CANADA

HER MAJESTY THE QUEEN V. CROWN ZELLERBACH CANADA LIMITED

- AND -

ATTORNEY GENERAL OF QUEBEC AND
ATTORNEY GENERAL OF BRITISH COLUMBIA

CORAM: The Chief Justice and Beetz, McIntyre, Lamer, Wilson, Le Dain and La Forest JJ.

LA FOREST J:

The issue raised in this appeal involves the extent to which the federal Parliament may constitutionally prohibit the disposal of substances not shown to have a pollutant effect in marine waters beyond the coast but within the limits of a province.

Facts

My colleague, Le Dain J., has set forth the facts, the applicable legislation and the judicial history of the case, and it is sufficient for me to make reference only to the most salient of these factual matters.

The respondent, Crown Zellerbach Canada Limited, was charged with "dumping" contrary to s. 4(1) of the *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55, which simply provides that no person shall dump except in accordance with the terms and conditions of a permit. Dumping is defined by s. 2(1) of the Act as "any deliberate disposal from ships, aircraft, platforms or other man-made structures at sea of any substance ..." (emphasis added).

The facts upon which the charge was based are briefly as follows. During the conduct of logging operations on Vancouver Island, British Columbia, Crown Zellerbach dredged woodwaste, consisting of water-logged logging debris such as bark, wood and slabs, from the ocean floor immediately adjacent to its dumping site in Beaver Cove and dumped it into deeper waters in Beaver Cove 60 to 80 feet seaward of the original dumpsite in a water lot area leased to the respondent by the Province of British Columbia. There is no evidence of any dispersal of the woodwaste or of any effect on navigation or marine life. The respondent had a permit to dump under the Act, but it did not cover dumping at the new site. The waters of Beaver Cove are *intra fauces terrae*, the opposite shores at its entrance being approximately one half mile; they are navigable and flow into Johnstone Strait, which is connected with the Pacific.

It was not disputed that the bed of the water at the dumping site is within, and belongs to, the Province; *Reference Re Ownership of the Bed of the Strait of Georgia and Related Areas*, (1984) 1 S.C.R. 388. According to the respondent, the waters of Beaver Cove are over 100 km from extra-provincial waters. However, the application of the Act is not thereby restricted, for "the sea" in which dumping is prohibited is not confined to the territorial sea and beyond, but by s. 2(2)(b) of the Act includes the internal waters of Canada other than inland waters (see s. 2(3)), i.e. the marine waters from the coast to the baseline of the territorial sea.

In the courts below, the respondent contested the validity of s. 4(1) as going beyond federal legislative jurisdiction and invading the provincial domain. As my colleague has indicated, the courts below accepted this contention. The Crown in right of Canada appealed to this Court seeking to have the provision declared valid. The respondent continues to maintain that the provision is invalid, but adds that in any event it should not apply to the facts of this case.

The constitutional question to be determined was framed in the following terms:

> Is Section 4(1) of the *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55, *ultra vires* of the Parliament of Canada, and, in particular, is it *ultra vires* of the Parliament of Canada in its application to the dumping of waste in the waters of Beaver Cove, an area within the Province of British Columbia?

The Attorneys General of British Columbia and of Quebec intervened in support of the view that s. 4(1) is constitutionally inapplicable to internal waters within a province.

The Issues

The principal thrust of the appellant's submission is that the subject matter of the *Ocean Dumping Control Act* is the control of ocean pollution. The control of ocean pollution, counsel for the appellant argued, is a matter that goes beyond local or provincial interests and is a matter of national concern to Canada as a whole and, as such, falls within Parliament's power to legislate in respect of the peace, order and good government of Canada. In the exercise of its jurisdiction to control ocean pollution, he continued, Parliament may prohibit the dumping of any substance, whether it is a pollutant or not, even in those areas of the sea that lie within the limits of a province. I propose to deal with this major issue later, confining myself at this point to a discussion of the further issues raised by the parties.

As subsidiary support for his principal submission, counsel relied on a number of heads of power under s. 91 of the *Constitution Act*, 1867 relating to the sea as exemplary of the types of matters falling within the general federal legislative power, specifically navigation and shipping (s. 91(10)), beacons, buoys and lighthouses (s. 91(9)), interprovincial and international ferries (s. 91(13)), and seacoast and inland fisheries (s. 91(12)). This subsidiary argument, I may say, at once proves too little and too much. Section 91(9), for example, does not include intra-provincial ferries, and s. 91(12) expressly includes both sea and fresh water fisheries. Beetz J. (dissenting but on this point speaking for the majority) disposed of a similar argument out of hand in *Re Anti-Inflation Act*, (1976) 2 S.C.R. 373, at pp. 458-9.

In this Court, counsel otherwise avoided reliance on the powers to legislate respecting fisheries or navigation as supporting s. 4(1). These arguments, as the courts below held, are untenable in light of the decision of this Court in *Fowler v. The Queen*, (1980) 2 S.C.R. 213. There the Court held ultra vires s. 33(3) of the federal *Fisheries Act* which prohibited any person engaged in logging, lumbering and other operations from putting woodwaste into water frequented by fish. Martland J., speaking for the Court, made it clear that for the provision to be justifiable as fishery legislation there had to be a link between the proscribed conduct and the actual or potential harm to fisheries. In his words: "It is a blanker prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries". (p. 226), As in the present case, there was no evidence of any such link. Both cases may be contrasted to *Northwest Falling Contractors Ltd. v. The Queen*, (1980) 2 S.C.R. 292, where the Court upheld s. 33(2) of the *Fisheries Act* which prohibited depositing in water frequented by fish any substance deleterious to fish.

There was, if anything, even less to link the prohibition in the present case to navigation. The prohibition is obviously not directed to the activity of navigation, and there is no evidence to show that the dumping interferes in any way with the navigability of the water.

I see no more merit in the submission, which appeared in the appellant's written submission, that the prohibition in s. 4(1) is justifiable as criminal law, and it is significant that counsel rather ignored this submission in his oral argument. It may be true that some of the items listed in the schedules to the Act could be harmful to human health if dumped in water, and it is also true that a prohibition properly directed at the protection of health might be justifiable as an exercise of the criminal law power; see *Reference re Validity of Section 5(a) of the Dairy Industry Act*, (1949) S.C.R. 1, at pp. 40-50. But it is difficult to see how the impunged provision preventing the dumping into marine waters of any substance, however inocuous, can be said to be aimed at the protection of health.

In the courts below, the appellant had also argued that the impunged provision could be supported in the basis of a federal treaty power as being intended to implement the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, which was signed by Canada on December 29, 1972. This argument was, however, rejected on the ground that, assuming such a power existed, it could not be used to support the impunged provision here having regard to Laskin C.J.C.'s statement in *MacDonald v. Vapor Canada Ltd.*, (1977) 2 S.C.R. 134, at pp. 171-72, that there had to be sufficiently clear indication in the Act that it was intended to implement a treaty. Counsel did not take up this argument in this Court, rightly in my view, because the Convention, unlike the Act, does not address pollution by dumping waste in the internal waters of a state, but is confined to dumping in the sea beyond the internal waters. Article III, para. 3 of the Convention defined "sea" as "all marine waters other than the internal waters of the States". I do not understand how the fact that Parliament has chosen to adopt a similar regime in internal waters not covered by the convention can be of any assistance in determining whether it has authority to prohibit dumping in internal waters within the province. In fact, while there is a general obligation imposed on the contracting states under Art. 1 of the Convention to promote the control of all sources of marine pollution, the practical steps to which these states pledge themselves in giving effect to this obligation are confined to "the dumping of waste or other matter that is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea". I fail to see, then, how the Convention can serve as justification for a blanket prohibition such as appears in s. 4(1) of the Act.

There remains, then, the appellant's argument that s. 4(1) is valid as legislation respecting ocean pollution under the peace, order and good government clause.

For his part, the respondent does not deny Parliament's power to regulate ocean pollution, but submits that s. 4(1) of the Act extends beyond the control of ocean pollution to encompass the dumping of all substances, whether pollutants or not. Much of the subject-matter of the section, the respondent continues, particularly as it relates to the facts of the present case, falls within the classes of subjects assigned exclusively to the provincial legislatures. The reality, it adds, is that while s. 4(1) deals with some matters falling within federal jurisdiction, such as extra-provincial dumping and extra-provincial pollution, which is clearly federal, it does not do so directly, but encompasses as well matters such as intra-provincial depositing of substances and intra-provincial pollution. It thus invades the following heads of provincial legislative powers: provincial public lands (s. 92(5)), local works and undertakings (s. 92(10)), property and civil rights (s. 92(13)), and matters of a local or private nature (s. 92(16)).

I start with the proposition that what is sought to be regulated in the present case is an activity wholly within the province, taking place on provincially owned land. Only local works and undertakings are involved, and there is no evidence that the substance made subject to the prohibition in s. 4(1) is either deleterious in any way or has any impact beyond the limits of the province. It is not difficult, on this basis, to conclude that the matter is one that falls within provincial legislative power unless it can somehow be established that it falls within Parliament's general power to legislate for the peace, order and good government of Canada.

Peace, Order and Good Government

There are several applications of the peace, order and good government power that may have relevance to the control of ocean pollution. One is its application in times of emergency. The federal Parliament clearly has power to deal with a grave emergency without regard to the ordinary division of legislative power under the Constitution. The most obvious manifestation of this power is in times of war or civil insurrection, but it has in recent years also been applied in peacetime to justify the control of rampant inflation; see Re: *Anti-Inflation Act*, supra. But while there can be no doubt that the control of ocean pollution poses a serious problem, no one has argued that it has reached such grave proportions as to require the displacement of the ordinary division of legislative power under the Constitution.

A second manner in which the power to legislate respecting peace, order and good government may be invoked in the present context is to control that area of the sea lying beyond the limits of the provinces. The federal government may not only regulate the territorial sea and other areas over which Canada exercises sovereignty, either under its power to legislate respecting its public property, or under the general power respecting peace, order and good government under s. 91 (*Reference re Offshore Mineral Rights of British Columbia*, (1967) S.C.R. 792) or under s. 4 of the Constitution Act, 1981, 34 & 35 Vict., c. 28 (U.K.). I have no doubt that it may also, as an aspect of its international sovereignty, exercise legislative jurisdiction for the control of pollution beyond its borders; see *Reference Re Newfoundland Continental Shelf*, (1984) 1 S.C.R. 86.

In legislating under its general power for the control of pollution in areas of the ocean falling outside provincial jurisdiction, the federal Parliament is not confined to regulating activities taking place within those areas. It may take steps to prevent activities in a province, such as dumping substances in provincial waters that pollute or have the potential to pollute the sea outside the province. Indeed, the exercise of such jurisdiction, it would seem to me, is not limited to coastal and internal waters but extends to the control of deposits in fresh water that have the effect of polluting outside a province. Reference may be made here to *Interprovincial Co-Operatives Ltd.* v. *The Queen*, (1976) 1 S.C.R. 477, where a majority of this Court upheld the view that the federal Parliament had exclusive legislative jurisdiction to deal with a problem that resulted from the depositing of a pollutant in a river in one province that had injurious effects in another province. This is but an application of the doctrine of national dimensions triggering the operation of the peace, order and good government clause.

It should require no demonstration that water moves in hydrologic cycles and that effective pollution control requires regulating pollution as its source. That source may, in fact, be situated outside the waters themselves. It is significant that the provision of the *Fisheries Act* upheld by this Court in *Northwest Falling Contractors Ltd. v. The Queen, supra*, as a valid means of protecting the fisheries not only prohibited the depositing of a deleterious substance in water, but in any place where it might enter waters frequented by fish. Given the way substances seep into the ground and the movement of surface and ground waters into rivers and ultimately into the sea, this can potentially cover a very large area. Indeed, since the pollution of the ocean in an important measure results from aerial pollution rather than from substances deposited in waters, similar regulations could be made in respect of substances that so pollute the air as to cause damage to the ocean or generally outside the provinces. (For discussions of the interaction of air pollutants and the ocean, see IMCO/FAO/UNESCO/WMO/WHO/IAEA/UN/UNEP Joint Group of Experts on the Scientific Aspects of Marine Pollution, reports and Studies No. 15, *The Review of the Health of the Oceans* (UNESCO 1982), at p. 3 (hereinafter "U.N. Report"), at, inter alia, p. 1-3, 15; Great Lakes Science Advisory Board to the International Joint Commission, *1980 Annual Report: A Perspective on the Problem of Hazardous Substances in the Great Lakes Basin Ecosystem* (Toronto 1980), est. at p. 22 (hereinafter "I.J.C. Report"); I.J.C. Report, Appendix A & B, "Assessment of Airborne Contaminants in the Great Lakes Basin Ecosystem", esp. at pp. 1, 9, 95. I should add that considerable administrative flexibility goes with the exercise of these powers. Thus considerable administrative control is given federal authorities by a power given by s. 33(4) of the Fisheries Act to exempt some pollutants in specified quantities in certain areas, subject to prescribed conditions. I see no reason why similar provisions could not be devised to control the pollution of the ocean.

The power above described can be complemented by provisions made pursuant to the criminal law power. Thus specific provisions prohibiting the deposit of particular substances could be devised in a manner similar to the prohibitions in the *Food and Drugs Act*. The combination of the criminal law power with its power to control pollution that has extra-provincial dimensions gives the federal Parliament very wide scope to control ocean pollution. While it would not be proper for me to enter into the validity of the provisions of the Clean Air Act which were upheld in *Re Canada Metal Co. Ltd. and The Queen* (1982), 144 D.L.R. (3d) 124 (Man, Q.B.), those provisions do indicate that a combination of the general federal legislative power and the criminal power could go a long way towards prohibiting the pollution of internal waters as well as those in territorial waters and the high seas.

In fact, as I see it, the potential breadth of federal power to control pollution by use of its general power is so great that, even without resort to the specific argument made by the appellant, the constitutional challenge in the end may be the development of judicial strategies to confine its ambit. It must be remembered that the peace, order and good government clause may comprise not only prohibitions, like criminal law, but regulation. Regulation to control pollution, which is incidentally only part of the even larger global problem of managing the environment, could arguably include not only emission standards but the control of the substances used in manufacture, as well as the techniques of production generally, insofar as these may have an impact on pollution. This has profound implications for the federal-provincial balance mandated by the Constitution. The challenge for the courts, as in the past, will be to allow the federal

Parliament sufficient scope to acquit itself of its duties to deal with national and international problems while respecting the scheme of federalism provided by the Constitution.

These considerations underline the importance of linking the prohibition to the purpose sought to be achieved. At times, that link can readily be inferred, for example in the case of dumping noxious fluid into coastal waters. In other cases, such as the depositing of noxious solid material inland, cogent proof will be required. These ideas were felicitiously put by Rand J. in *Saumur v. City of Quebec*, (1953) 2 S.C.R. 299, at p. 333:

> Conceding, as in the Alberta Reference, that aspects of the activities of religion and free speech may be affected by provincial legislation, such legislation, as in all other fields, must be sufficiently definite and precise to indicate its subject matter. In our political organization, as in federal structures generally, that is the condition of legislation by any authority within it: the courts must be able from its language and its relevant circumstances, to attribute an enactment to a matter in relation to which the legislature acting has been empowered to make laws. That principle inheres in the nature of federalism; otherwise, authority, in broad and general terms, could be conferred which would end the division of powers. Where the language is sufficiently specific and can fairly be interpreted as applying only to matter within the enacting jurisdiction, that attribution will be made; and where the requisite elements are present, there is the rule of severability. But to authorize action which may be related indifferently to a variety of incompatible matters by means of the device of a discretionary license cannot be brought within either of these mechanisms; and the Court is powerless, under general language that overlaps exclusive jurisdictions, to delineate and preserve valid power in a segregated form. If the purpose is street regulation, taxation, registration or other local object, the language must, with sufficient precision, define the matter and mode of administration; and by no expedient which ignores that requirement can constitutional limitations be circumvented.

However widely one interprets the federal power to control ocean pollution along the preceding line of analysis, it will not serve to support the provision impugned here, one that, as in the *Fowler* case, supra, is a blanket prohibition against depositing any substance in waters without regard to its nature or amount, and one moreover where there is, in Martland J.'s words, at p. 226 of the case, "no attempt to link the proscribed conduct to actual or potential harm" to what is sought to be protected; in *Fowler*, the fisheries, here, the ocean. As in *Fowler*, too, there is no evidence to indicate that the full range of activities caught by the provision cause the harm sought to be prevented. Whether one views this in terms of protecting federal marine property or as an attempted application of the national dimensions doctrine in the matter somewhat akin to that in the *Interprovincial Co-operatives* case, *supra*, the second proposition of Lord Tomlin in *Attorney-General for Canada v. Attorney-General for British Columbia* (the Fish Canneries case), (1930) A.C. 111, at p. 118, has relevance here. It reads:

> (2) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion: see *Attorney-General for Ontario v. Attorney-General for the Dominion* ((1986) A.C. 348).

(cited by Martland J. in *Fowler, supra*, at p. 220). Here, Parliament may undoubtedly prohibit the dumping of anything into federal waters, but unless a more comprehensive theory for applying the national dimensions doctrine can be found, prohibitions against dumping substances into provincial waters must be linked to some federal power.

Why Parliament should have chosen to enact a prohibition in such broad terms is a matter upon which one is left to speculate. It may be that, in view of the lack of knowledge about the effects of various substances deposited in water, it may be necessary to monitor all such deposits. We have no evidence on the extent to which it is necessary to monitor all deposits into the sea to develop an effective regime for the prevention of ocean pollution. A system of monitoring that was necessarily incidental to an ineffective legislative scheme for the control of ocean pollution could constitutionally be justified. But here not only was no material advanced to establish the need for such a system, the Act goes much further and prohibits the deposit of any substance in the sea, including provincial internal waters. If such a provision were held valid, why would a federal provision prohibiting the emission of any substance in any quantity into the air, except as permitted by federal authorities, not be constitutionally justifiable as a measure for the control of ocean pollution, it now being known that deposits from the air are a serious source of ocean pollution? See U.N. *Report*, at p. 15; I.J.C. *Report*, at p. 22. Here again an excerpt from Lord Tomlin's judgement in the *Fish Canneries* case, supra, at pp. 121-22, also cited by Martland J. in *Fowler, supra*, at pp. 224-25, may usefully be cited. It reads:

> It may be, though on this point their Lordships express no opinion, that effective fishery legislation requires that the Minister should have power for the purpose of enforcing regulations against the taking of unfit fish or against the taking of fish out of season, to inspect all fish canning or fish curing establishments and require them to make appropriate statistical returns. Even if this were so the necessity for applying to such establishments any such licensing system as is embodied in the section in question does not follow. It is not obvious that any licensing system is necessarily incidental to effective fishery legislation, and no material has been placed before the Supreme Court or their Lordships' Board establishing the necessary connection between the two subject matters. In their Lordships' view, therefore, the appellant's second contention is not well founded.

Counsel for the appellant did not, of course, frame the issue in the manner in which I have thus far discussed it. I have examined it in this way, however, to show that on a more traditional approach to the underlying issues than he suggests Parliament has very wide powers to deal with ocean pollution, whether within or outside the limits of the province, but that even if one stretches this traditional approach to its limits, the impunged provision cannot constitutionally be justified. It requires a quantum leap to find constitutional justification for the provision, one, it seems to me, that would create considerable stress on Canadian federalism as it has developed over the years. What he argues for, we saw, is that the dumping of any substance in the sea beginning, apparently, from the coasts of the provinces and the mouths of provincial rivers falls exclusively within the legislative jurisdiction of Parliament as being a matter of national concern or dimension even though the seabed is within the province and whether or not the substance is noxious or potentially so.

Le Dain J. has in the course of his judgment discussed the cases relating to the development of the "national concern or dimension" aspect of the peace, order and good government clause, and I find it unnecessary to review that development in any detail. It is sufficient for my purpose to say that this development has since the 1930s particularly been resorted to from time to time to bring into the ambit of federal power a number of matters, such as radio (*In re Regulation and Control of Radio Communication in Canada*, (1932) A.C. 304), aeronautics (*Johannesson v. Municipality of West St-Paul*, (1952) 1 S.C.R. 292), and the national capital region (*Munro v. National Capital Commission*, (1966) S.C.R. 663), that are clearly of national importance. They do not fit comfortably within provincial power. Both in their workings and in their practical implications they have predominantly national dimensions. Many of these subjects are new and are obviously of extra-provincial concern. They are thus appropriate for assignment to the general federal legislative power. They are often related to matters intimately tied to federal jurisdiction. Radio (which is relevant to the power to regulate interprovincial undertakings) is an example. The closely contested issue of narcotics control (cf. *R. v. Hauser*, (1979) 1 S.C.R. 984 and *Schneider v. The Queen*, (1982) 2 S.C.R. 112, per Laskin C.J.) is intimately related to criminal law and international trade.

The need to make such characterizations from time to time is readily apparent. From this necessary function, however, it is easy but, I say it with respect, fallacious to go further, and, taking a number of quite separate areas of activity, some under accepted constitutional values within federal, and some within provincial legislative capacity, consider them to be a single indivisible matter of national interest and concern lying outside the specific heads of power assigned under the Constitution. By conceptualizing broad social, economic and political issues in that way, one can effectively invent new heads of federal power under the national dimensions doctrine, thereby incidentally removing them from provincial jurisdiction of at least abridging the provinces' freedom of operation. This, as I see it, is the implication of the statement made by my colleague, then Professor Le Dain, in his article, "Sir Lyman Duff and the Constitution" (1974), 12 *Osgoode Hall L.J.* 261. He states, at p. 293:

> As reflected in the *Munro* case, the issue with respect to the general power, where reliance cannot be placed on the notion of emergency, is to determine what are to be considered to be single, indivisible matters of national interest and concern lying outside the specific heads of jurisdiction in sections 91 and 92. It is possible to invent such matters by applying new names to old legislative purposes. There is an increasing tendency to sum up a wide variety of legislative purposes in single, comprehensive designations. Control of inflation, environmental protection, and preservation of the national identity or independence are examples.

Professor Le Dain was there merely posing the problem; he did not attempt to answer it. It seems to me, however, that some of the examples he gives, and if accepted as items falling within the general power of Parliament, would radically alter the division of legislative power in Canada. The attempt to include them in the federal general power seems to me to involve fighting on another plane the war that was lost on the economic plane in the Canadian new deal cases. My colleague Beetz J, has, in *Re: Anti-Inflation Act*, *supra*, fully supported this way of viewing things in rejecting the control of inflation as a proper subject for incorporation into the peace, order and good government clause under the national dimension doctrine. (His was, we saw, a dissenting judgement, but on this issue too, his views were shared by a majority of the Court). He there revealed the fallacy of looking at inflation as a single source of federal power in the following passages, at pp. 457-8:

> In my view, the incorporation of companies for objects other than provincial, the regulation and control of aeronautics and of radio, the development, conservation and improvement of the National Capital Region are clear instances of distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern.
>
> I fail to see how the authorities which so decide lend support to this first submission. They had the effect of adding by judicial process new matters of new classes of matters to the federal list of powers. However, this was done only in cases where a new matter was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form. The scale upon which these new matters enabled Parliament to touch on provincial matters had also to be taken into consideration before they were recognized as federal matters: if an enumerated federal power designated in broad terms such as the trade and commerce power had to be construed so as not to embrace and smother provincial power (*Parsons'* case) and destroy the equilibrium of the Constitution, the Courts must be all the more careful not to add hitherto unnamed powers of a diffuse nature to the list of federal powers.
>
> The 'containment and reduction of inflation' does not pass muster as a new subject matter. It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory.
>
> I should add that inflation is a very ancient phenomenon, several thousand years old, as old probably as the history of currency. The Fathers of Confederation were quite aware of it.

What was there said by Beetz J. seems to me to apply, *a fortiori,* to the control of the environment, a subject more germane to the present issue. All physical activities have some environmental impact. Possible legislative responses to such activities cover a large number of the enumerated legislative powers, federal and provincial. To allocate the broad subject-matter of environmental control to the federal government under its general power would effectively gut provincial legislative jurisdiction. As I mentioned before, environment protection, of course, encompasses far more than environmental pollution, which is what we are principally concerned with here. To take an example from the present context, woodwaste in some circumstances undoubtedly pollutes the environment, but the very depletion of forests itself affects the ecological balance and, as such, constitutes an environmental problem. But environmental pollution alone is itself all-pervasive. It is a by-product of everything we do. In man's relationship with the environment, waste is unavoidable. The problem is thus not new, although it is only recently that the vast amount of waste products emitted into the atmosphere or dumped in water has begun to exceed the ability of the atmosphere and water to absorb and assimilate it on a global scale. There is this cause for concern and governments at every level have begun to deal with the many activities giving rise to problems of pollution. In Canada, both federal and provincial levels of government have extensive powers to deal with these matters. Both have enacted comprehensive and specific schemes for the control of pollution and the protection of the environment. Some environmental pollution problems are of more direct concern to the federal government, some to the provincial government. But a vast number are inter-related, and all levels of government actively cooperate to deal with problems of mutual concern; for an example of this, see the Great Lakes study in *I.J.C. Report*.

To allocate environmental pollution exclusively to the federal Parliament would, it seems to me, involve sacrificing the principles of federalism enshrined in the Constitution. As Professor William R. Lederman has indicated in his article, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 *Can. Bar Rev.* 597, at p. 610, environmental pollution "is no limited subject or theme, (it) is a sweeping subject or theme virtually all-pervasive in its legislative implications". If, he adds, it "were to be enfranchised as a new subject of federal power by virtue of the federal general power, then provincial power and autonomy would be on the way out over the whole range of local business, industry and commerce as established to date under the existing heads of provincial powers". And I would add to the legislative subjects that would be substantially eviscerated the control of the public domain and municipal government. Indeed as Beetz J. in *Re: Anti-Inflation Act*, supra, at p. 458, stated of the proposed power over inflation, there would not be much left of the distribution of power if Parliament had exclusive jurisdiction over this subject. For similar views that the protection of environmental pollution cannot be attributed to a single head of legislative power, see P.W. Hogg, *Constitutional Law of Canada* (2nd ed. 1985) at pp. 392, 598; Gérald Beaudoin, "La protection de l'environnement et ses implications en droit constitutionnel" (1977), 23 *McGill L.J. 207*.

It is true, of course, that we are not invited to create a general environmental pollution power but one restricted to ocean pollution. But it seems to me that the same considerations apply. I shall, however, attempt to look at it in terms of the qualities or attributes that are said to mark the subjects that have been held to fall within the peace, order and good government clause as being matters of national concern. Such a subject, it has been said, must be marked by a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. In my view, ocean pollution fails to meet this test for a variety of reasons. In addition to those applicable to environmental pollution generally, the following specific difficulties may be noted. First of all, marine waters are not wholly bounded by the coast; in many areas, they extend upstream into rivers for many miles. The application of the Act appears to be restricted to waters beyond the mouths of rivers (and so intrude less on provincial powers), but this is not entirely clear, and if it is so restricted, it is not clear whether this distinction is based on convenience or constitutional imperative. Apart from this, the line between salt and fresh water cannot be demarcated clearly; it is different at different depts of water, changes with the season and shifts constantly; see *U.N. Report, supra*, at p. 12. In any event, it is not so much the waters, whether fresh or salt, with which we are concerned, but their pollution. And the pollution of marine water is contributed to by the vast amounts of effluents that are poured or seep into fresh waters everywhere (*ibid.*, at p. 13). There is a constant intermixture of waters; fresh waters flow into the sea and marine waters penetrate deeply inland at high tide only to return to the sea laden with pollutants collected during their incursion inland. Nor is the pollution of the ocean confined to pollution emanating from substances deposited in water. In important respects, the pollution of the sea results from emissions into the air, which are then transported over many miles and deposited into the sea; see *U.N. Report*, at p. 15; I.J.C. *Report*, at p. 22. I cannot, therefore, see ocean pollution as a sufficiently discrete subject upon which to found the kind of legislative power sought here. It is an attempt to create a federal pollution control power on unclear geographical grounds and limited to part only of the causes of ocean pollution. Such a power then simply amounts to a truncated federal pollution control power only partially effective to meet its supposed necessary purpose, unless of course one is willing to extend it to pollution emanating from fresh water and the air, when for reasons already given such an extension could completely swallow up provincial power, no link being necessary to establish the federal purpose.

This leads me to another factor considered in identifying a subject as falling within the general power as a matter of national domain: its impact on provincial legislative power. Here, it must be remembered that in its supposed application within the province the provision virtually prevents a province from dealing with certain of its own public property without federal consent. A wide variety of activities along the coast or in the adjoining sea involves the deposit of some substances in the sea. In fact, where large cities like Vancouver are situated by the sea, this has substantial relevant to recreational, industrial and municipal concerns of all kinds. As a matter of fact, the most polluted areas of the sea adjoin the coast; see *U.N. Report*, at pp. 3-4. Among the major causes of this are various types of construction, such as hotels and harbours, the development of mineral resources and recreational activities (*ibid.*, at p. 3). These are matters of immediate concern to the province. They necessarily affect activities over which the provinces have exercised some kind of jurisdiction over the years. Whether or not the "newness" of the subject is a necessary criterion for inventing new areas of jurisdiction under the peace, order and good government clause, it is certainly a relevant consideration if it means removing from the provinces areas of jurisdiction which they previously exercised. As I mentioned, pollution, including coastal pollution, is no new phenomenon, and neither are many of the kinds of activities that result in pollution.

A further relevant matter, it is said, is the effect on extra-provincial interests of a provincial failure to deal effectively with the control of intra-provincial aspects of the matters. I have some difficulty following all the implications of this, but taking it at face value, we are dealing here with a situation where, as we saw earlier, Parliament has extensive powers to deal with conditions that lead to ocean pollution wherever they occur. The difficulty with the impugned provision is that it seeks to deal with activities that cannot be demonstrated either to pollute or to have a reasonable potential of polluting the ocean. The prohibition applies to an inert substance regarding which there is no proof that it either moves or pollutes. The prohibition in fact would apply to the moving of rock from one area of provincial property to another. I cannot accept that the federal Parliament has such wide legislative power over local matters having local import taking place on provincially owned property. The prohibition in essence constitutes an impermissible attempt to control activities on property held to be provincial in *Reference Re Ownership of the Bed of the Strait of Georgia and Related Areas, supra*. It may well be that the motive for enacting the provision is to prevent ocean pollution, but as Beetz J. underlines the *Re: Anti-Inflation Act*, supra, Parliament cannot do this by attempting to regulate a local industry, although it can, of course, regulate the activities of such an industry that fall within federal power, whether such activities are expressly encompassed within a specific head of power, e.g. navigation, or affect areas of federal concern, e.g. health under the criminal law power, or cause pollution to those parts of the sea under federal jurisdiction. But here the provision simply overreaches. In its terms, it encompasses activities - depositing innocuous substances into provincial waters by local undertakings on provincial lands - that fall within the exclusive legislative jurisdiction of the province.

Finally, it was argued that the provision might be read down to apply to federal waters only, but I do not think this is possible. One need only look at the broad definition of "the sea" in s. 2(2) and (3) to appreciate the comprehensive reach of the Act. Besides, it is well known that many bays and other internal bodies of waters in Canada fall within the limits of the provinces. Many of the federal internal waters are located in the Arctic and have been expressly dealt with by the federal government.

Disposition

I would dismiss the appeal with costs and reply to the constitutional question in the affirmative.

COUR SUPRÊME DU CANADA

SA MAJESTÉ LA REINE et CROWN ZELLERBACH CANADA LIMITED
et LE PROCUREUR GÉNÉRAL DU QUÉBEC
et LE PROCUREUR GÉNÉRAL DE LA COLOMBIE-BRITANNIQUE

Appel entendu: le 26 juin 1986
Jugement rendu: le 24 mars 1988

CORAM:

Le très hon. Brian Dickson, c.p.
L'honorable juge Beetz
L'honorable juge McIntyre
L'honorable juge Lamer
L'honorable juge Wilson
L'honorable juge Le Dain
L'honorable juge La Forest

Motifs de jugement par:

L'honorable juge Le Dain

Souscrivent à l'avis de l'honorable juge Le Dain

Le très hon. Brian Dickson, c.p.
L'honorable juge McIntyre
L'honorable juge Wilson

Motifs de dissidence par:

L'honorable juge La Forest

Souscrivent à l'avis de l'honorable juge La Forest

L'honorable juge Beetz
L'honorable juge Lamer

Pour l'appelante:

T.B. Smith, Q.C.
D.R. Kier, Q.C.
Roger Tassé

Pour l'intimée:

Duncan Shaw, Q.C.
Brian D. Gilfillan

pour le Procureur général du Québec:

Odette Laverdière
Alain Gringras

Pour le Procureur général de la Colombie-Britannique:
E. Robert A. Edwards, Q.C.

Droit constitutionnel — Partage des compétences législatives — Pollution de la mer — Immersion de déchets dans des eaux maritimes provinciales — Mesure législative fédérale interdisant l'immersion de substances en mer sauf en conformité avec un permis -- Inclusion dans la définition de la mer, donnée par la loi fédérale, des eaux intérieures du Canada, les eaux douces exceptées -- Validité de la mesure législative fédérale — La pollution de la mer est-elle une question d'intérêt national relevant de la compétence législative du Parlement en matière de paix, d'ordre et de bon gouvernement du Canada? — Loi sur l'immersion de déchets en mer, S.C. 1974-75-76, chap. 55, art 4(1) — Loi constitutionnelle de 1867, art. 91 "préambule", (10). (12).

Dans le cadre de l'exploitation de son entreprise de coupe de bois l'intimée a procédé à l'immersion de résidus de bois dans les eaux de Beaver Cove, une zone située à l'intérieur de la province de la Colombie-Britannique, et a été accusée d'infraction au par. 4(1) de la *Loi sur l'mmersion de déchets en mer*. La loi fédérale interdit l'immersion de substances en mer, sauf en conformité avec un permis, la mer étant définie pour les fins de la Loi comme incluant les eaux intérieures du Canada, les eaux douces exceptées. L'intimée était titulaire d'un permis d'immersion délivré en vertu de la Loi, mais ce permis ne visait pas cet endroit. Les eaux de Beaver Cove sont navigables et se jettent dans le détroit de Johnstone qui communique avec le Pacifique. Il n'existe aucune preuve qu'il y ait eu dispersion des résidus de bois ni que cela ait eu un effet quelconque sur la navigation ou sur la faune et la flore marines. Au procès, le juge de la Cour provinciale a rejeté les accusations portées, et l'appel interjeté par voie d'exposé de cause a été rejeté. Le juge de première instance et la Cour d'appel ont déclaré tous les deux que le par. 4(1) de la Loi outrepasse la compétence du Parlement. Ce pourvoi vise à déterminer la constitutionnalité de l'application du par. 4(1) de la Loi à l'immersion de déchets dans les eaux d'une province, autres que les eaux douces.

Arrêt (les juges Beetz, Lamer et La Forest sont dissidents): Le pourvoi est accueilli.

Le juge en chef Dickson et les juges McIntyre, Wilson et Le Dain: *La Loi sur l'immersion de déchets en mer* s'intéresse à l'immersion de substances dont on peut démontrer ou présumer qu'elles ont un effet nocif sur le milieu marin et elle peut être considérée comme visant le contrôle ou la réglementation de la pollution des mers. La compétence législative fédérale, attribuée par le par. 91(12) de la *Loi constitutionnelle de 1867*, en matière de pêcheries des côtes de la mer et de l'intérieur n'est pas suffisante en soi pour étayer la constitutionnalité du par. 4(1) de la Loi, puisque cette disposition, prise dans le contexte de l'ensemble de la Loi, ne satisfait pas au critère énoncé dans les arrêts *Fowler c. La Reine*, (1980) 2 R.C.S. 213, et *Northwest Falling Contractors Ltd. c. La Reine*, (1980) 2 R.C.S. 292. Certes, l'effet qu'a sur les pêcheries la pollution des mers résultant de l'immersion de déchets constitue manifestement l'un des sujets de préoccupation de la Loi, mais ce n'est pas là le seul effet de ce genre de pollution auquel la Loi s'intéresse. Le fondement d'une compétence législative fédérale pour contrôler la pollution des mers en général, dans les eaux provinciales, ne saurait se trouver dans les chefs de compétence fédérale énumérés à l'art. 91 de la *Loi constitutionnelle de 1867*, pris individuellement ou collectivement.

Toutefois, le paragraphe 4(1) de la *Loi sur l'immersion de déchets en mer* est constitutionnel parce qu'il porte sur une matière relevant de la théorie de l'intérêt national qui justifie l'exercise de la compétence que possède le Parlement du Canada en matière de paix, d'ordre et de bon gouvernement. La théorie de l'intérêt national, qui est séparée et distincte de la théorie de la situation d'urgence nationale, s'applique autant à de nouvelles matières qui n'existaient pas à l'époque de la Confédération qu'à des matières qui, bien qu'elles fussent à l'origine de nature locale ou privée dans une province, sont depuis devenues des matières d'intérêt national, sans qu'il y ait situation d'urgence nationale. Pour qu'on puisse dire qu'une matière est d'intérêt national dans un sens ou dans l'autre, elle doit avoir une unicité, une particularité et une indivisibilité qui la distinguent clairement des matières d'intérêt provincial, et un effet sur la compétence provinciale qui soit compatible avec le partage fondamental des pouvoirs législatifs effectué par la Constitution. Pour déterminer si une matière possède l'unicité, la particularité et l'indivisibilité requises, il est utile d'examiner quel effet aurait sur les intérêts extraprovinciaux l'omission d'une province de s'occuper efficacement du contrôle ou de la réglementation des aspects intraprovinciaux de cette matière. Le contrôle de la pollution de la mer satisfait à ce critère. La pollution des mers, à cause de son caractère et de ses incidences extraprovinciales surtout, mais aussi internationales, est manifestement une matière qui intéresse le Canada tout entier. La pollution des eaux de la mer, y compris les eaux maritimes provinciales, résultant de l'immersion de substances peut suffisamment se distinguer de la pollution des eaux douces due à de telles immersions pour satisfaire à l'unicité ou à l'indivisibilité requises. Même si dans bien des cas, la pollution des eaux douces a pour effet de polluer les eaux de la mer dans lesquelles elles se déversent, la pollution de la mer, à cause des différences qui existent entre les eaux de la mer et les eaux douces sur le plan de leur composition et de leur action, comporte ses propres caractéristiques et présente des considérations scientifiques qui la distinguent de la pollution des eaux douces. En outre, la distinction entre eaux salées et eaux douces, pour limiter l'application de la *Loi sur l'immersion de déchets en mer*, satisfait au critère sur lequel la Cour, à la majorité, a insisté dans le *Renvoi: Loi anti-inflation*, (1976) 2 R.C.S. 373, savoir que pour qu'on puisse dire qu'une matière revêt un intérêt national et relève de la compétence fédérale en matière de paix, d'ordre et de bon gouvernement, elle doit comporter des limites vérifiables et raisonnables, pour ce qui est de son incidence sur la compétence provinciale.

Les juges Beetz, Lamer et La Forest (dissidents): En vertu de sa compétence générale en matière de paix, d'ordre et de bon gouvernement, le Parlement peut légiférer afin de contrôler la pollution dans des zones maritimes situées en dehors du ressort des provinces, et ce faisant, il n'est pas limité à la réglementation des activités qui se déroulent dans ces zones. En vertu de la théorie des dimensions nationales justifiant l'exercice de la compétence générale, le Parlement peut prendre des mesures pour empêcher certaines activités dans une province, comme le déversement dans des eaux provinciales ou dans l'atmosphère, de substances polluant ou susceptibles de polluer la mer à l'extérieur de la province. Le pouvoir de contrôler la pollution du milieu marin que peut exercer le Parlement en vertu de sa compétence générale peut aussi être complété par des dispositions adoptées en vertu de la compétence en matière de droit criminel. Cependant, bien que le Parlement puisse indubitablement interdire les immersions de toute nature dans les eaux fédérales, les interdictions d'immerger des substances dans les eaux provinciales doivent être liées à une compétence fédérale quelconque. En fait, pour respecter le régime fédéral prévu par la Constitution, on doit chercher à établir un lien entre la conduite prohibée et les dommages réels ou probables que ce que l'on cherche à protéger pourrait subir en l'espèce, l'océan. Dans la présente affaire, le par. 4(1) de la *Loi sur l'immersion de déchets en mer* outrepasse la compétence du Parlement, car il n'y a aucune preuve qu'un lien de ce genre existe. La disposition est une interdiction générale de déverser quelque substance que ce soit dans les eaux, peu importe sa nature ou sa quantité.

Le contrôle de l'environnement ne peut légitimement être incorporé dans la compétence en matière de paix, d'ordre et de bon gouvernement, en vertu de la théorie des dimensions nationales. Toutes les activités physiques ont un effet quelconque sur l'environnement. Les réactions législatives possibles à ces activités visent un nombre important de pouvoirs législatifs énumérés, fédéraux et provinciaux. Attribuer le sujet général du contrôle de l'environnement au gouvernement fédéral en vertu de sa compétence générale aurait pour effet de dépouiller de son contenu la compétence législative provinciale et reviendrait à sacrifier les principes du fédéralisme enchâssés dans la Constitution. De plus, la pollution n'est pas un phénomène nouveau, pas plus que bien des activités qui en sont la cause.

Les mêmes considérations s'appliquent à la création d'une compétence en matière d'environnement restreinte au contrôle de la pollution du milieu marin. Un tel sujet n'est pas caractérisé par une unicité, une particularité et une indivisibilité qui le distinguent clairement des questions d'intérêt provincial. Les eaux de la mer ne s'arrêtent pas entièrement à la côte et leur ligne de démarcation ne peut être tracée clairement. En outre, la compétence fédérale proposée aurait sur le domaine de compétence provinciale un effet incompatible avec le partage des pouvoirs législatifs prévus par la Constitution. Enfin, le Parlement jouit déjà de pouvoirs étendues pour remédier à des conditions qui entraînent la pollution du milieu marin partout où elles se présentent. La difficulté que pose la disposition contestée en l'espèce réside dans le fait qu'elle cherche à régir des activités dont on ne peut démontrer qu'elles polluent ou qu'il est raisonnable de croire qu'elles peuvent polluer l'océan. La disposition va tout simplement trop loin et, d'après ses propres termes, elle vise des activités, savoir le dépôt de substances inoffensives, dans des eaux provinciales, par des entreprises locales, sur des biens-fonds provinciaux, qui relèvent de la compétence législative exclusive de la province. Le Parlement fédéral ne jouit pas d'une compétence législative aussi large sur des matières locales, ayant des conséquences locales, sur un domaine appartenant à la province. L'interdiction constitue essentiellement une tentative inacceptable de contrôler des activités sur un domaine jugé provincial.

Jurisprudence

Citée par le juge Le Dain

Arrêts examinés: *Johannesson v. Municipality of West St. Paul*, (1952) 1 R.C.S. 292; *Munro v. National Capital Commission* (1966) R.C.S. 663; *Renvoi: Loi anti-inflation*, (1976) 2 R.C.S. 373; R. c. Hauser, (1979) 1 R.C.S. 984; Brasseries Labatt du Canada Ltée c. *Procureur général du Canada*, (1980) 1 R.C.S. 914; *Schneider c. La Reine* (1982) 2 R.C.S. 112; *R. c. Wetmore*, (1983) 2 R.C.S. 284; *Fort Frances Pulp & Power Co. v. Manitoba Free Press Co.*, (1923) A.C. 695; *Northwest Falling Contractors Ltd. c. La Reine*, (1980) 2 R.C.S. 292; Fowler c. La Reine, (1980) 2 R.C.S. 213; *Interprovincial Co-Operative Ltd. c. La Reine*, (1976) 1 R.C.S. 477; arrêts mentionnés: *Attorney-General for Ontario v. Attorney-General for the Dominion*, (1896) A.C. 348 (affaire des prohibitions locales); *Attorney-General for Ontario v. Canada Temperance Federation*, (1946) A.C. 193; *MacDonald c. Vapor Canada Ltd.*, (1977) 2 R.C.S. 134; *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas* (1976), 1 B.C.L.R. 97, confirmé par (1984) 1 R.C.S. 388.

Citée par le juge La Forest (dissident)

Arrêt appliqué: *Fowler c. La Reine*, (1980) 2 R.C.S. 213; arrêts mentionnés: *Northwest Falling Contractors Ltd. c. La Reine*, (1980) 2 R.C.S. 292; *Interprovincial Co-Operatives Ltd. c. La Reine*, (1976) 1 R.C.S. 477; *Renvoi relatif à la propriété du lit du*

détroit de Géorgie et des régions avoisinantes, (1984) 1 R.C.S. 388; *Renvoi: Loi anti-inflation*, (1976) 2 R.C.S. 373; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, (1949) R.C.S. 1; *MacDonald c. Vapor Canada Ltd.* (1977) 2 R.C.S. 134; *Reference re Offshore Mineral Rights of British Columbia*, (1967) R.C.S. 792; *Renvoi relatif au plateau continental de Terre-Neuve*, (1984) 1 R.C.S. 86; *Re Canada Metal Co. and The Queen* (1982), 144 D.L.R. (3d) 124; *Saumur v. City of Quebec*, (1953) 2 R.C.S. 299; *Attorney-General for Canada v. Attorney-General for British Columbia*, (1930) A.C. 111; *In re Regulation and Control of Radio Communication in Canada*, (1932) A.C. 304; *Johannesson v. Municipality of West St. Paul*, (1952) 1 R.C.S. 292; *Munro v. National Capital Commission*, (1966) R.C.S. 663; *R. c. Hauser*, (1979) 1 R.C.S. 984; *Schneider c. La Reine*, (1982) 2 R.C.S. 112.

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Constitution Act, 1867, ss. 91(9), 91(10), 91(12), 91(13), 91(27), 92(5), 92(10), 92(13), 92(16).

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Ocean Dumping Control Act, S.C. 1974-75-76, c. 55, ss. 2(1) "Convention", "Dumping", (2), (3), 4(1), (2), 5(2), 9, 10, 13(1)(c), 28(3), Schedules I (am. Sor/81-721), II (am. idem), III.

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APPEAL from a judgment of the British Columbia Court of Appeal (1984), 51 B.C.L.R. 32, 7 D.L.R. (4th) 449, 11 C.C.C. (3d) 113, 13 C.E.L.R. 29, (1984) 2 W.W.R. 714, Dismissing an appeal by way of stated case from a judgment of the Provincial court (1982), 11 C.E.L.R. 151, dismissing charges under s. 4(1) of the *Ocean Dumping Control Act*. Appeal allowed, Beetz, Lamer and La Forest JJ. dissenting.

LE JUGE LE DAIN:

La question qui se pose dans ce pourvoi est de savoir si la compétence législative fédérale pour réglementer l'immersion de substance en mer, à titre de mesure de prévention de la pollution du milieu marin, s'étend à la réglementation des immersions dans les eaux de la mer situées dans une province. Est en cause la validité du par. 4(1) de la *Loi sur l'immersion de déchets en mer*, S.C. 1975-75-76, chap. 55, qui interdit l'immersion de substances en mer, sauf en conformité avec un permis, la mer étant définie pour les fins de la Loi comme incluant les eaux intérieures du Canada, les eaux douces exceptées.

Le présent pourvoi est formé, avec l'autorisation de cette Cour, contre l'arrêt rendu le 26 janvier 1984 par la Cour d'appel de la Colombie-Britannique (1984), 51 B.C.L.R. 32, 7 D.L.R. (4th) 449, (1984) 2 W.W.R. 714, 11 C.C.C. (3d) 113, 13 C.E.L.R. 29, qui a rejeté l'appel par voie d'exposé de cause interjeté contre le jugement prononcé le 26 mai 1982 par le juge Schmidt de la Cour provinciale (1982), 11 C.E.L.R. 151, qui avait rejeté les accusations inculpant l'intimée d'avoir procédé à une immersion illégale dans les eaux du détroit de Johnstone, près de Beaver Cove dans la province de la Colombie-Britannique, pour le motif que le par. 4(1) de la *Loi sur l'immersion de déchets en mer* outrepasse la compétence du Parlement du Canada.

La *Loi sur l'immersion de déchets en mer* a pour objet général de réglementer l'immersion de substances en mer, afin de protéger le milieu marin contre divers types de dommages. La Loi semblerait avoir été adoptée en exécution des obligations qui incombent au Canada en vertu de la *Convention sur la prévention de la pollution des mers résultant de l'immersion de déchets* qu'il a signée le 29 décembre 1972. La Loi ne le dit pas expressément, mais elle comporte plusieurs références à cette convention (voir les par. 2(1), 4(2), 5(2), 9(6) et 28(3)), et ses annexes, I, II et III où l'on traite respectivement des "Substances interdites", des "Substances réglementées" et des "Facteurs à prendre en considération lors de la délivrance des permis", semblent pour ainsi dire calquées sur les annexes I, II et III de la Convention. Les annexes de la Loi ont été modifiées de manière à incorporer les modifications apportées aux annexes de la Convention (voir C.P. 1981-2509, 16 septembre 1981, DORS/81-721, 21 septembre 1981).

Les préoccupations auxquelles la Loi veut répondre se dégagent de la nature des substances interdites ou réglementées figurant aux annexes I et II et des facteurs que le ministre de l'Environnement doit prendre en considération lors de la délivrance de permis d'immersion, lesquels sont énoncées aux art. 9 et 10 et à l'annexe III de la Loi. Ces dispositions indiquent que la Loi s'intéresse à la pollution de la mer et à ses répercussions sur la faune et la flore marines, sur la santé humaine et sur les zones d'agrément du milieu marin. Il est fait mention aussi de l'effet des immersions sur la navigation et le transport maritime et sur les autres utilisations légitimes de la mer.

Le paragraphe 4(1) de la Loi, auquel l'intimée est accusée d'avoir contrevenu, se lit comme suit:

> 4.(1) Il ne peut être procédé à des immersions qu'en conformité d'un permis.

Le paragraphe 2(1) de la Loi définit ainsi le terme "immersion":

> 2.(1) Dans la présente loi,
>
> ...
>
> "immersion" désigne tout rejet délibéré de substances à partir de navires, aéronefs, plates-formes ou autres ouvrages placés en mer, à l'exclusion
>
> a) du rejet résultant ou provenant de l'exploitation normale d'un navire ou d'un aéronef ou de leur équipement, sauf cas du rejet de substances à partir d'un navire ou d'un aéronef affecté à cette fin; et
>
> b) du déversement résultant ou provenant de l'exploitation, de l'exploitation et du traitement en mer des ressources minérales du fond des mers;

Les paragraphes 2(2) et (3) donnent une définition de la "mer", pour les fins de la Loi:

> 2. ...
>
> (2) Pour l'application de la présente loi, "mer" désigne
>
> a) la mer territorial du Canada;
>
> b) les eaux intérieures du Canada, à l'exclusion des eaux internes;
>
> c) les zones de pêche réglementées conformément à la Loi sur la mer territoriale et les zones de pêche;
>
> d) les eaux arctiques au sens de la Loi sur la prévention de la pollution des eaux arctiques;
>
> e) les zones de mer réglementées, contigues aux eaux visées aux alinéas a) à d);
>
> f) les zones de mer relevant de la souveraineté d'un État étranger, à l'exclusion des eaux intérieures; et
>
> g) les zones de mer, à l'exclusion des eaux intérieures d'un État étranger, non comprises dans les eaux visées aux alinéas a) à f).
>
> (3) Pour l'application de l'alinéa (2)b), l'expression "eaux internes" désigne l'ensemble des fleuves, rivières, lacs et autres eaux douces du Canada et comprend la partie du fleuve Saint-Laurent délimitée, vers la mer, par les lignes droites joignant

a) Cap-des Rosiers à la pointe extrême ouest de l'île d'Anticosti; et

b) l'île d'Anticosti à la rive nord du fleuve Saint-Laurent suivant le méridien de soixante-trois degrés de longitude ouest.

Les articles 9 et 10 de la Loi, qui portent sur le pouvoir du ministre de l'Environnement de délivrer des permis d'immersion, sont ainsi conçus en partie:

> 9.(1) Sous réserve des paragraphes (4) et (5), le Ministre peut délivrer le permis qu'exige la présente loi lorsqu'il est saisi d'une demande présentée en la forme réglementaire.
>
> (4) Il ne peut être délivré de permis d'immersion en vertu du présent article, si l'immersion, le rejet ou l'abandon envisagé dans la demande est interdit par une autre loi du Parlement du Canada ou si la licence ou le permis à cet effet qu'une telle loi pourrait exiger, n'a pas été obtenu.
>
> (5) Il ne peut être délivré de permis pour l'une des substances énumérées à l'annexe I que si, de l'avis du Ministre,
>
> a) cette substance est rapidement rendue inoffensive dans la mer par des processus physiques, chimiques ou biologiques, ne rend pas impropres à la consommation des organismes marins ordinairement comestibles, n'altère pas le goût de ces organismes et ne présente aucun danger pour la santé de l'homme ou celles des animaux;
>
> b) lorsqu'il s'agit d'une substance visée aux paragraphes 1 à 5 de cette annexe, la substance apparaît dans une autre substance en quantité ou concentration ne dépassant pas le maximum réglementaire;
>
> c) l'immersion, le rejet ou l'abandon d'une certaine quantité de cette substance est nécessaire afin d'éviter une situation d'urgence présentant des risques inacceptables pour la santé humaine et n'admet aucune autre solution possible; ou
>
> d) de la transformation de cette substance, par incinération ou autre moyen de dégradation thermique, ne dérivent que des substances
>
> (i) qui figurent à l'annexe I et pour lesquelles les alinéas a) ou b) autorisant la délivrance d'un permis, ou
>
> (ii) qui ne figurent pas à l'annexe I.
>
> ...
>
> 10.(1) Le Ministre, saisi d'une demande, tient compte, pour décider de la délivrance du permis,
>
> a) des facteurs énumérés à l'annexe III; et,
>
> b) de tout autre facteur en jeu à son appréciation.

(2) Un permis doit comporter les conditions que le Ministre juge nécessaires à la protection de la vie humaine, du milieu biologique marin ou de toute utilisation légitime de la mer et, notamment, stipuler celles des conditions suivantes qui sont applicables:

(a) la nature et la quantité de la substance dont l'immersion, le rejet ou l'abandon est autorisé;

(b) le mode et la fréquence des immersions, des rejets ou des abandons, y compris, au besoin, leurs dates;

(c) la manière de charger et d'entreposer la substance dont l'immersion, le rejet ou l'abandon est autorisé;

(d) le lieu d'immersion, de rejet ou d'abandon;

(e) la route du navire ou de l'aéronef qui transporte la substance jusqu'au lieu d'immersion, de rejet ou d'abandon; et

(f) les précautions spéciales à prendre quant au chargement, au transport, à l'immersion, au rejet ou à l'abandon de la substance.

Les annexes I et II, modifiées par le décret C.P. 1981-2509 du 16 septembre 1981, et l'annexe III de la Loi sont ainsi conçues:

ANNEXE I

SUBSTANCES INTERDITES

1. Les composés organohalogénés.
2. Le mercure et ses composés.
3. Le cadmium (sic) et ses composés.
4. Les plastiques non destructibles et autres matières synthétiques non destructibles.
5. Pétrole brut et ses déchets, produits du pétrole raffiné, résidus du pétrole distillé et tout mélange contenant l'un ou l'autre de ces produits.
6. Les déchets fortement radioactifs désignés par règlement.
7. Les substances produites pour la guerre biologique et chimique sous quelque forme que ce soit.

ANNEXE II

SUBSTANCES RÉGLEMENTÉES

1. L'arsenic et ses composés.
2. Le plomb et ses composés.
3. Le cuivre et ses composés.
4. Le zinc et ses composés.
5. Les composés organosiliconés.
6. Les cynanures.
7. Les fluorures.
8. Les pesticides et sous-produits de pesticides non visés à l'annexe I.
9. Le béryllium et ses composés.
10. Le chrome et ses composés.
11. Le nickel et ses composés.
12. Le vanadium et ses composés.
13. Les conteneurs et les déchets métalliques.
14. Les déchets radioactifs ou autres matières radioactives non comprises à l'annexe I.
15. Toute substance qui, de par son volume, gênerait la pêche.
16. Les substances qui, bien que non toxiques par nature, peuvent devenir nocives en raison des quantités immergées, ou qui sont de nature à diminuer sensiblement les agréments.

ANNEXE III

FACTEURS À PRENDRE EN CONSIDÉRATION LORS DE LA DÉLIVRANCE DES PERMIS

1. Caractéristiques et composition de la substance

   (1) Quantité totale et composition moyenne de la substance immergée (exemple: par an).

   (2) Forme, par exemple solide, boueuse, liquide ou gazeuse.

   (3) Propriétés physiques (telles que la solubilité et densité), chimiques et biochimiques (telle que demande en oxygène, éléments nutritifs) et biologiques (telles que présence de virus, bactéries, levures, parasites).

(4) Toxicité.

(5) Persistance: physique, chimique et biologique.

(6) Accumulation et transformation biologique dans les matières et sédiments biologiques.

(7) Sensibilité aux transformations physiques, chimiques et biochimiques et interaction dans le milieu aquatique avec d'autres matières organiques et inorganiques dissoutes.

(8) Probabilité de contamination et autres altérations diminuant la valeur commerciale des ressources marines (poissons, crustacés et mollusques testacés, etc.).

2. Caractéristiques du lieu d'immersion et méthode de dépôt

(1) Emplacement (coordonnées de la zone d'immersion, profondeur et distance des côtes), situation par rapport à d'autres emplacements (tels que zones d'agrément, de frai, de culture et de pêche, et ressources exploitables).

(2) Cadence d'évacuation de la matière (par exemple, quotidienne, hebdomadaire, mensuelle).

(3) Méthodes d'emballage et de conditionnement, le cas échéant.

(4) Dilution initale réalisée par la méthode de décharge proposée.

(5) Caractéristiques de dispersion (telles qu'effets des courants, des marées et du vent sur le déplacement horizontal et le brassage vertical).

(6) Caractéristiques de l'eau (telles que température, pH, salinité, stratification, indices de pollution: notamment oxygène dissous (OD), demande biochimique en oxygène (DBO), demande chimique en oxygène (DCO), présence d'azote sous forme organique ou minérale et notamment présence d'ammoniaque, des matières en suspension, autres matières nutritives, productivité).

(7) Caractéristiques du fond (telles que topographie, caractéristiques géochimiques et géologiques, productivité biologique).

(8) Existence et effets d'autres immersions pratiquées dans la zone d'immersion (par exemple, relevés indiquant la présence de métaux lourds et teneur en carbone organique).

(9) Lors de la délivrance d'un permis d'immersion, les parties contractantes s'efforcent de déterminer s'il existe une base scientifique d'évaluation des conséquences de l'immersion comme indiqué dans cette annexe, en tenant compte également des variations saisonnières.

3. Considérations et circonstances générales

(1) Effets éventuels sur les zones d'agrément (tels que présence de matériaux flottants ou échoués, turbidité, odeurs désagréables, décoloration, écume).

(2) Effets éventuels sur la faune et la flore marines, la pisciculture et la conchyliculture, les réserves poissonnières et les pêcheries, la récolte et la culture d'algues.

(3) Effets éventuels sur les autres utilisations de la mer (altération de la qualité de l'eau pour des usages industriels, corrosion sous-marine des ouvrages en mer, perturbations du fonctionnement des navires par les matières flottantes, entraves à la pêche et la navigation dues au dépôt de déchets ou d'objets solides sur le fond de la mer et protection de zones d'une importance particulière du point de vue scientifique ou de la conservation).

(4) Possibilités pratiques de recourir sur la terre ferme à d'autres méthodes de traitement, de rejet ou d'élimination, ou à des traitements réduisant la nocivité des matières avant leur immersion en mer.

Le paragraphe 13(1) de la Loi porte:

> 13.(1) Quiconque contrevient aux articles 4, 5 ou 6 commet une infraction et est passible, sur déclaration sommaire de culpabilité, d'une amende maximale de
>
> a) cent mille dollars, lorsque l'infraction porte sur l'une des substances énumérées à l'annexe I;
>
> b) soixante-quinze mille dollars, lorsque l'infraction porte sur l'une des substances énumérées à l'annexe II; ou
>
> c) cinquante mille dollars, lorsque l'infraction porte sur une substance non comprise dans les annexes I et II.

L'intimée a été accusée, dans une dénonciation comportant deux chefs, d'avoir contrevenu au par. 4(1) de la Loi, commettant ainsi une infraction visée à l'al. 13(1)c):

(TRADUCTION)

Premier chef: Le 16 août 1980 ou vers cette date, dans les eaux du détroit de Johnstone, près de Beaver Cove dans la province de la Colombie-Britannique, a procédé à une immersion illégale, sans permis, contrairement à l'art 4 de la Loi sur l'immersion de déchets en mer, commettant ainsi une infraction visée à l'al. 13(1)c) de ladite loi.

Deuxième chef: Le 17 août 1980 ou vers cette date, dans les eaux du détroit de Johnstone, près de Beaver Cove dans la province de la Colombie-Britannique, a procédé à une immersion illégale, sans permis, contrairement à l'art 4 de la Loi sur l'immersion de déchets en mer, commettant ainsi une infraction visée à l'al. 13(1)c) de ladite loi.

Voici les faits reconnus concernant le lieu et la nature de l'immersion dont l'intimée est inculpée. L'intimée s'adonne à la coupe du bois sur l'île de Vancouver dans le cadre de l'entreprise de produits forestiers qu'elle exploite en Colombie-Britannique et possède un point de déboulement pour ses billes sur un plan d'eau loué à la province, pour l'entreposage du bois qu'on entoure d'estacades, à Beaver Cove, aux abords du détroit de Johnstone, sur la côte nord-est de l'île de Vancouver. Les eaux de Beaver Cove sont *inter* *fauces terrae* ou, comme on le dit dans l'exposé de cause (TRADUCTION) "L'étendue de Beaver Cove est telle qu'en se tenant sur l'une ou l'autres de ses rives, on peut facilement et raisonnablement discerner l'autre rive." Les 16 et 17 août 1980, l'intimée, utilisant une grue de 80 pieds installée sur un chaland amarré, a procédé au dragage du fond de la mer le long du rivage, à son point de déboulement, à Beaver Cove, pour déposer dans les eaux plus profondes de l'anse, à quelque 60 à 80 pieds au large, les résidues de bois dragués. Par ce dragage et ce déversement, on voulait pouvoir amener une nouvelle structure en A, pour le déboulement des billes, sur un chaland jusqu'à la rive, pour l'y installer, et avoir de l'espace pour faire débouler des paquets de billes, du haut de la structure en A, dans les eaux du point de déboulement. Les résidus de bois consistaient en débris imbibés d'eau comme des morceaux d'écorce, de bois et de dosses. Il n'y a aucune preuve qu'il y ait eu dispersion des résidues de bois ni que cela ait eu un effet quelconque sur la navigation ou sur la faune et la flore marines. À l'époque en question, le seul permis dont l'intimée était titulaire en vertu de la Loi avait été délivré le 28 juillet 1980 ou vers cette date, et était valide jusqu'au 25 juillet 1981; il l'autorisait à procéder à des immersions en un point du détroit de Johnstone situé à quelques 2,2 milles marins du lieu où ont été immergés les résidus de bois.

Le juge Schmidt de la Cour de la Colombie-Britannique a conclu que les eaux de Beaver Cove où les résidus de bois ont été immergés sont situées dans la province de la Colombie-Britannique. Pour appuyer cette conclusion, il s'est référé à l'arrêt de la Cour d'appel de la Colombie-Britannique *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas* (1976), 1 B.C.L.R. 97, où la cour à la majorité a jugé que les eaux du détroit de Johnstone, dont Beaver Cove fait partie, sont situées à l'intérieur des limites de la Colombie-Britannique. (Cette Cour a subséquemment rejeté le pourvoi formé contre cet arrêt, dans le *Renvoi relatif à la propriété du lit du détroit de Georgie et des régions avoisinantes*, (1984) 1 R.C.S. 388.) Selon le juge Schmidt, la réglementation de l'immersion des résidus de bois au point où l'intimée procédait au déboulement des billes à Beaver Cove, dans le cours de ses activités de coupe de bois, relève du chef de compétence législative provinciale que l'on trouve au par. 92(5) de la *Loi constitutionnelle de 1867*, savoir "l'administration et la vente des terres publiques appartenant à la province, et des bois et forêts qui s'y trouvent". Il a jugé en outre que la réglementation de ce genre d'immersion ne relevait pas du chef de compétence législative fédérale prévu au par. 91(10), savoir "la navigation et les expéditions par eau", ni de celui prévu au par. 91(12), savoir "les pêcheries des côtes de la mer et de l'intérieur". Appliquant l'arrêt de cette Cour *Fowler c. La Reine*, (1980) 2 R.C.S. 213, il a conclu que le par. 4(1) de la Loi (TRADUCTION) "ne cherche pas à lier la conduite prohibée au préjudice réel ou éventuel que pourraient subir les pêcheries ou une entrave à la navigation ou aux expéditions par eau." Enfin, le juge Schmidt a rejeté l'argument de l'intimée portant que le Parlement du Canada jouissait de la compétence législative pour adopter le par. 4(1) en vertu de son pouvoir de mise à exécution des traités. Appliquant ce qu'a dit le juge en chef Laskin dans l'arrêt *MacDonald c. Vapor Canada Ltd.*, (1977) 2 R.C.S. 134, il a jugé qu'il n'y avait pas dans la Loi d'indication suffisamment claire qu'elle avait été adoptée en exécution de la *Convention sur la prévention de la pollution des mers résultant de l'immersion de déchets*. En définitive, le juge Schmidt a conclu que le par. 4(1) de la Loi outrepassait la compétence du Parlement du Canada et a rejeté les accusations portées contre l'intimée.

La Cour d'appel de la Colombie-Britannique (les juges Carrothers, Aikens et Macdonald) a, dans un arrêt unanime, rejeté l'appel par voie d'exposé de cause interjeté contre ce jugement. Le juge Macdonald, qui a rédigé les motifs de la Cour, a rejeté les arguments de l'appelante fondés sur la compétence fédérale en matière de navigation et d'expéditions par eau et en matière de pêcheries des côtes de la mer et de l'intérieur, pour la même raison que le juge Schmidt. Appliquant les arrêts de cette Cour *Fowler*, précité, et *Northwest Falling Contractors Ltd. c. La Reine*, (1980) 2 R.C.S. 292, il a conclu que la Loi ne cherchait pas à lier la conduite prohibée au préjudice réel ou éventuel que pourraient subir la navigation ou les pêcheries et qu'elle ne satisfait donc pas au critère énoncé dans ces arrêts. Le juge Macdonald a lui aussi rejeté l'argument de l'appelante fondé sur le pouvoir fédéral de mise à exécution des traités, en s'appuyant sur ce qu'avait affirmé le juge en chef Laskin dans l'arrêt *MacDonald c. Vapor Canada Ltd.*, précité. Il a conclu que l'immersion de substances à Beaver Cove était une question qui relevait de la compétence législative provinciale fondée sur les par. 92(5), 92(13) et 92(16) de la *Loi constitutionnelle de 1867*. Il a rejeté l'argument selon lequel cela faisait partie d'une nouvelle matière, appelée pollution des mers, qui était inconnu à l'époque de la Confédération et qui, n'étant pas une matière d'une nature purement locale ou privée dans la province, relevant de la compétence du Parlement du Canada en matière de paix, d'ordre et de bon gouvernement, selon l'arrêt de cette Cour *R. c. Hauser*, (1979) 1 R.C.S. 984.

Lorsqu'on s'est pourvu en cette Cour, la question constitutionnelle a été formulée ainsi:

> Le paragraphe 4(1) de la *Loi sur l'immersion de déchets en mer*, S.C. 1974-75-76, chap. 55, est-il *ultra vires* du Parlement du Canada, et, en particulier, est-il ultra vires du Parlement du Canada dans son application à l'immersion de déchêts dans les eaux de Beaver Cove, à l'intérieur des frontières de la Colombie-Britannique?

II

Comme la question constitutionnelle l'indique, le pourvoi soulève la question de la constitutionnalité de l'application du par 4(1) de la Loi à l'immersion de déchets dans les eaux d'une province. L'intimée reconnaît, comme il se doit, que le Parlement a compétence pour réglementer les immersions dans les eaux situées en dehors des limites territoriales d'une province. Elle convient aussi que le Parlement a compétence pour réglementer les immersions de substances dans les eaux provinciales afin d'empêcher la pollution de ces eaux qui serait préjudiciable aux pêcheries, si la mesure législative fédérale satisfait au critère énoncé dans les arrêts *Fowler* et *Northwest Falling*. Elle concède enfin, vu l'opinion exprimée dans l'arrêt de cette Cour *Interprovincial Co-operatives Ltd. c. La Reine*, (1976) 1 R.D.S. 477, que le Parlement a compétence pour réglementer les immersions, dans des eaux provinciales, de substances dont il peut être démontré qu'elles polluent des eaux à l'extérieur de la province. Ce que l'intimée conteste, c'est la compétence fédérale pour contrôler l'immersion, dans des eaux provinciales, de substances dont il n'a pas été démontré qu'elles ont pour effet de polluer les eaux à l'extérieur de la province. L'intimée prétend que, d'après les faits qui ont été reconnus, c'est précisément le cas en l'espèce. Elle fait valoir que, dans la mesure où le par. 4(1) de la Loi ne peut être interprété que comme ayant pour objet de s'appliquer à de telles immersions, il est inconstitutionnel ou, subsidiairement, que ce paragraphe devrait être interprété, si possible, de façon à ne pas s'appliquer à de telles immersions. Dans un cas comme dans l'autre, le pourvoi doit être rejeté. Le procureur général de la Colombie-Britannique, qui appuie la contestation de l'application du par 4(1) à l'immersion de déchets à Beaver Cove, et dont le procureur général du Québec partage l'opinion, a fait valoir de même que le par. 4(1) devrait être interprété restrictivement de façon à ne pas s'appliquer aux immersions dans des eaux provinciales. Il a soutenu que la question constitutionnellle devrait recevoir la réponse suivante: (TRADUCTION) Le paragraphe 4(1) de la *Loi sur l'immersion de déchets* en mer est constitutionnellement inapplicable aux eaux de la mer situées dans une province et donc la définition du terme "mer", au par. 2(2) de la Loi, doit être interprétée de manière à exclure de l'expression "eaux intérieures du Canada", que l'on trouve à son alinéa b), les eaux intérieures situées dans une province."

Devant la Cour, le procureur général du Canada n'a pas soutenu qu'il y avait un lien suffisant entre la Loi et la navigation pour valider le par. 4(1) en fonction de la compétence fédérale en matière de navigation et d'expéditions par eau. Il a fait valoir cependant, si j'ai bien compris, qu'il existe un lien suffisant entre la Loi et la protection des pêcheries pour satisfaire au critère énoncé dans les arrêts *Fowler* et *Northwest Falling*, quoiqu'il ne m'ait pas paru accorder beaucoup d'importance à cet argument. Son argument principal devant la Cour a été que, pour les raisons indiquées dans la Loi, le contrôle des immersions dans les eaux de la mer situées dans une province fait partie d'une seule matière d'intérêt national ou de dimension nationale, qui relève de la compétence fédérale en matière de paix, d'ordre et de bon gouvernement. Il a qualifié cette matière de prévention de la pollution des mers ou des océans. Son recours aux chefs de compétence fédérale spécifiques en matière de navigation et d'expéditions par eau et en matière de pêcheries des côtes de la mer et de l'intérieur, ainsi qu'en d'autres matières de nature maritime, servait plutôt à indiquer, selon lui, la portée qu'il faudrait attribuer au pouvoir, découlant de la compétence fédérale en matière de paix, d'ordre et de bon gouvernement, de réglementer les immersions de substances dans le but de prévenir la pollution des mers. Le procureur général du Canada a bien fait comprendre qu'il n'invoquait pas devant nous la théorie des pouvoirs auxiliaires ou nécessairement accessoires. Il a prétendu que le contrôle des immersions dans les eaux de la mer situées dans une province fait partie intégrante d'une seule et même matière d'intérêt national. Il n'a pas non plus invoqué devant nous le pouvoir en matière de paix, d'ordre et de bon gouvernement comme fondement de la compétence fédérale pour adopter la *Loi sur l'immersion de déchets* en mer en exécution de la Convention sur la prévention de la *pollution des mers résultant de l'immersion de déchets*. Il a dit de la Convention et de ses annexes qu'elles indiquent le mal que la Loi vise à parvenir et qu'elles corroborent sa qualification du sujet visé par l'adoption de la Loi. Dans son mémoire, le procureur général du Canada a lui aussi invoqué jusqu'à un certain point la compétence fédérale en matière de droit criminel, attribuée par le par. 91(27) de la *Loi constitutionnelle de 1867*, comme fondement constitutionnelle de l'adoption du par. 4(1) de la Loi, à titre de mesure de prévention d'une atteinte à la santé publique, mais si j'ai bien compris, il n'a pas insisté sur cet argument lors de sa plaidoirie.

Avant d'examiner le rapport qu'il y a entre le sujet sur lequel porte la Loi et les fondements possibles de la compétence législative fédérale, il faudrait en dire plus long sur la qualification de ce sujet, selon les prétentions respectives des parties. Comme je l'ai dit, l'appelant soutient que la Loi vise le contrôle ou la réglementation de la pollution des mers, le sujet même de la *Convention sur la prévention de la pollution des mers résultant de l'immersion de déchets:* D'autre part, l'intimée soutient que, par les termes qu'elles emploie, la Loi vise les immersions qui n'ont pas nécessairement pour effet de polluer. Elle interdit l'immersion de toute substance, y compris une substance non spécifiée aux annexes I ou II, sauf si cela est fait conformément à un permis. À mon avis, malgré sa portée apparente, on peut fort bien considérer que la Loi, prise dans son ensemble, ne vise que le contrôle ou la réglementation de la pollution des mers, dans la mesure où cela peut importer pour la question de la compétence législative. La mode de réglementation choisi, le seul efficace peut-être, rend nécessaire, afin d'empêcher la pollution de la mer, d'interdire l'immersion de toute substance sans permis. Le but poursuivi est d'exiger un permis afin de permettre à l'organisme de réglementation de décider, avant l'immersion projetée, si celle-ci peut être autorisée, à certaines conditions, compte tenu des facteurs et considérations précises aux art. 9 et 10 et à l'annexe III de la Loi. La Loi s'intéresse à l'immersion de substances dont on peut démontrer ou présumer qu'elles ont un effet nocif sur le milieu marin. C'est le Ministre, et non la personne qui se propose de procéder à l'immersion, qui doit juger de cela selon les critères ou facteurs indiqués aux art. 9 et 10 et à l'annexe III de la Loi. On ne laisse pas entendre que la Loi est censée permettre d'interdire toutes les immersions, sans égard à la perception d'un effet nocif, ou à la probabilité d'un tel effet sur le milieu marin. La nature du milieu marin et sa protection contre tout effet nocif dû à des immersions sont des questions complexes qui doivent être laissées au jugement des experts.

III

Avant d'examiner la question de l'application de la compétence fédérale en matière de paix, d'ordre et de bon gouvernement, il est nécessaire de se prononcer sur l'effet des arrêts de cette Cour *Fowler* et *Northwest Falling*, vu l'importance particulière qui leur a été accordée dans les décisions des tribunaux d'instance inférieure et dans les plaidoiries de l'intimée et des procureurs généraux des provinces devant cette Cour.

L'arrêt *Fowler* portait sur la validité du par. 33(3) de la *Loi sur les pêcheries*, S.R.C. 1970, chap. F-14, qui prévoyait: "Il est interdit à quiconque fait l'abattage ou la coupe de bois, le défrichement ou autres opérations de déposer ou de permettre sciemment de déposer des déchets de bois, souches ou autres débris dans une eau fréquentée par le poisson ou qui se déverse dans cette eau, ou sur la glace qui recouvre l'une ou l'autre de ces eaux, ou de les déposer dans un endroit d'où il est probable qu'ils soient entraînés dans l'une ou l'autre de ces eaux." Le juge Martland, prononçant l'arrêt unanime de la Cour, a vu dans la jurisprudence portant sur la nature et la portée de la compétence législative fédérale en matière de pêcheries des côtes de la mer et de l'intérieur l'indication que cette compétence se rapporte à la protection et à la conservation des pêcheries en tant que ressource publique, et dans les définitions d'une pêcherie une indication à la fois du droit de capturer du poisson et du lieu où ce droit peut être exercé. Il a ensuite affirmé, à la p. 224:

> La disposition législative en cause ici ne traite pas directement des pêcheries, comme telles, au sens où l'entendent ces définitions. Elle cherche plutôt à réglementer certaines activités non parce qu'elles ont des conséquences nuisibles sur le poisson à strictement parler mais plutôt parce qu'elles pourraient en avoir. De prime abord, le par. 33(3) réglemente la propriété et les droits civils dans les limites d'une province. Puisqu'il traite effectivement de ces droits et non spécifiquement de "pêcheries", il faut, pour en appuyer la validité, démontrer qu'il vise des sujets nécessairement accessoires à une législation efficace en matière de pêcheries des côtes de la mer et de l'intérieur.

Après avoir souligné la portée fort large du par. 33(3) qui s'applique "non seulement à une eau fréquentée par le poisson mais également à une eau qui se déverse dans cette eau, à la glace qui recouvre cette eau et à tout endroit d'où il est probable que les déchets de bois, les souches et les autres débris soient entraînés dans cette eau", le juge Martland conclut, à la p. 226:

> Le paragraphe 33(3) ne cherche pas à établir un lien entre la conduite prohibée et les dommages, réels ou probables, que les pêcheries pourraient subir. C'est une interdiction générale d'exercer certaines activités de compétence provinciale; ce paragraphe ne fixe pas les éléments de l'infraction de manière à établir un lien entre l'interdiction et les dommages vraisemblables aux pêcheries. De plus, aucune preuve produite devant la Cour n'indique que l'ensemble des activités visées par le paragraphe cause effectivement des dommages aux pêcheries. À mon avis, l'interdiction, dans ses termes généraux, n'est pas nécessairement accessoire au pouvoir fédéral de légiférer sur les pêcheries des côtes de la mer et de l'intérieur et elle excède les pouvoirs du Parlement fédéral.

L'arrêt *Northwest Falling* portait sur la validité du par. 33(2) de la *Loi sur les pêcheries* qui dispose: "Sous réserve du paragraphe (4), il est interdit à qui que ce soit de déposer ou de permettre que l'on dépose une substance nocive dans des eaux poissonneuses ou en quelque lieu dans des conditions où cette substance nocive ou une autre substance nocive résultant du dépôt de cette substance pourrait pénétrer dans de telles eaux." Une "substance nocive" y est définie comme celle qui modifierait la qualité de l'eau de façon à le rendre "nocive ... pour le poisson ou son habitat ou encore à rendre nocive l'utilisation par l'homme du poisson qui vit dans cette eau". La validité du par. 33(2) était contestée pour le motif, notamment, qu'il visait la pollution des eaux en général. La Cour a jugé le par. 33(2) constitutionnel en tant que disposition législative qui "vise la protection et la conservation des pêcheries", susceptibles d'être distinguée à cet égard du par. 33(3), déclaré inconstitutionnel dans l'arrêt *Fowler*. Le juge Martland, qui ici encore a prononcé l'arrêt unanime de la Cour, a fait la distinction suivante entre les deux paragraphes, à la p. 301:

> À la différence du par. 33(2), le par. 33(3) ne fait pas référence à des substances nocives. Le texte du paragraphe fait en sorte que ce dernier ne se limite pas aux activités nuisibles aux poissons ou à leur habitat. Le fondement de l'arrêt *Fowler* se trouve dans l'extrait suivant:
>
>> Le paragraphe 33(3) ne cherche pas à établir un lien entre la conduite prohibée et les dommages, réels ou probables, que les pêcheries pourraient subir. C'est une interdiction générale d'exercer certaines activités de compétence provinciale; ce paragraphe ne fixe pas les éléments de l'infraction de manière à établir un lien entre l'interdiction et les dommages vraisemblables aux pêcheries.
>>
>> À mon avis, le par. 33(2) est de la compétence du Parlement du Canada. La définition d'une "substance nocive" fait en sorte que la portée du par. 33(2) se limite à une interdiction de déposer des substances nuisibles aux poissons, à leur habitat ou à l'utilisation du poisson par l'homme.

Je suis d'accord avec le juge Schmidt de la Cour provinciale et la Cour d'appel de la Colombie-Britannique pour dire que la compétence législative fédérale en matière de pêcheries des côtes de la mer et de l'intérieur n'est pas suffisante en soi pour étayer la constitutionnalité du par. 4(1) de la Loi, puisque cette disposition, prise dans le contexte de l'ensemble de la Loi, ne satisfait pas au critère énoncé dans les arrêts Fowler et Northwest Falling. Certes, l'effet qu'a sur les pêcheries la pollution des mers résultant de l'immersion de déchets constitue manifestement l'un des sujets de préoccupation de la Loi, mais ce n'est pas là le seul effet de ce genre de pollution auquel la Loi s'intéresse. Le fondement d'une compétence législative fédérale pour contrôler la pollution des mers en général, dans les eaux provinciales, ne saurait se trouver dans les chefs de compétence fédérale énumérées à l'art. 91 de la Loi constitutionnelle de 1867, pris individuellement ou collectivement.

IV

Il est donc nécessaire d'examiner la théorie des dimensions nationales ou de l'intérêt national (nom sous lequel elle est généralement désignée maintenant) justifiant l'exercice de la compétence fédérale en matière de paix, d'ordre et de bon gouvernement, en tant que fondement éventuel de la constitutionnalité de l'application du par. 4(1) de la Loi au contrôle des immersions dans les eaux de mer provinciales.

La théorie de l'intérêt national a été proposée par lord Watson dans l'affaire des prohibitions locales (*Attorney-General for Ontario v. Attorney-General for the Dominion*, (1896) A.C. 348) et a reçu sa formulation moderne du vicomte Simon dans *Attorney-General for Ontario v. Canada Temperance Federation*, (1946) A.C. 193. Dans l'affaire des prohibitions locales, lord Watson affirme, à la p. 361:

> (TRADUCTION) Leurs Seigneuries ne doutent pas que certaines matières à l'origine locales et provinciales puissent atteindre des proportions telle qu'elles affecteraient le corps politiques du Dominion, permettant ainsi au Parlement canadien d'adopter des lois en vue de leur réglementation ou abolition dans l'intérêt du Dominion. Toutefois, il faut exercer une grande prudence en distinguant ce qui est local et provincial, et par conséquent du ressort des législatures provinciales, d'avec ce qui a cessé d'être purement local ou provincial pour revêtir un aspect national, de façon à relever de la compétence du Parlement du Canada.

Dans l'arrêt *Canada Temperance Federation*, le vicomte Simon dit, aux pp. 205 et 206:

> (TRADUCTION) De l'avis de leurs Seigneuries, c'est dans la vraie matière de cette législation qu'il faut en rechercher le caractère véritable: si elle est telle qu'elle dépasse les préoccupations ou les intérêts locaux ou provinciaux et doit par sa nature même constituer une préoccupation pour le Dominion dans son ensemble, par exemple, dans les affaires de l'aéronautique et de la radiocommunication, elle entre alors dans les attributions du Parlement du Dominion à titre de matière relative à la paix, à l'ordre et au bon gouvernement du Canada, en dépit du fait qu'elle peut, à d'autres égards, se rattacher à des matières spécifiquement réservées aux législatures provinciales. La guerre et une épidémie de peste en sont sans nul doute des exemples; il peut en être de même du trafic des boissons ou des drogues ou du port d'armes. Dans l'affaire *Russell c. La Reine*, sir Montague Smith a cité comme exemple de législation fédérale valide une loi qui prohiberait ou limiterait la vente ou l'exposition du bétail atteint d'une maladie contagieuse. La validité d'une telle législation, lorsqu'elle découle de sa nature propre, n'est pas non plus affectée du fait qu'elle laisse une place à la législature provinciale pour édicter des texts législatifs qui traitent d'un aspect particulier du même sujet, dans la mesure où celui-ci touche spécialement une province.

La conception que se fait la Cour de la théorie de l'intérêt national justifiant l'exercice de la compétence fédérale en matière de paix, d'ordre et de bon gouvernement, énoncée dans l'arrêt *Canada Temperance Federation*, doit être puisée dans l'étude ou l'application qu'on a faite de cette théorie dans les arrêts suivants: *Johannesson v. Municipality of West St. Paul*, (1952) 1 R.C.S. 292; *Munro v. National Capital Commission*, (1966) R.C.S. 663; *Renvoi: Loi anti-inflation*, (1976) 2 R.C.S. 373; *R. c. Hauser*, précité, *Brasseries Labatt du Canada Ltée c. Procureur général du Canada*, (1980) 1 R.C.S. 914, *Schneider c. La Reine*, (1982) 2 R.C.S. 112; and *R. c. Wetmore*, (1983) 2 R.C.S. 284.

La théorie de l'intérêt national, énoncée dans l'arrêt *Canada Temperance Federation*, est mentionnée et approuvée par la Cour à la majorité dans l'arrêt *Johannesson* comme fondement de la compétence législative exclusive du Parlement sur tout le domaine de l'aéronautique. Dans l'affaire *Munro*, où la *Loi sur la Capitale nationale* a été reconnue valide en fonction de la compétence fédérale en matière de paix, d'ordre et de bon gouvernement, le juge Cartwright, prononçant l'arrêt unanime de la Cour, a affirmé que la Cour a adopté la théorie de l'intérêt national dans son arrêt *Johannesson* et que l'aménagement de la région de la Capitale nationale constituait (TRADUCTION) "un sujet unique et d'intérêt national" (p. 671).

La théorie de l'intérêt national a fait l'objet de commentaires importants de la Cour dans le *Renvoi: Loi anti-inflation*. La Cour à la majorité (le juge en chef Laskin et les juges Martland, Judson, Ritchie, Spence, Pigeon et Dickson) a reconnu la constitutionnalité de la Loi en fonction de la théorie de la situation d'urgence justifiant l'exercice de la compétence fédérale en matière de paix, d'ordre et de bon gouvernement, en tant que mesure législative nécessaire pour faire face à une "crise" (terme utilisé par le juge en chef Laskin) ou à une "situation d'urgence nationale" (expression utilisée par le juge Ritchie). Au cours d'une étude exhaustive de la jurisprudence relative à la compétence fédérale en matière de paix, d'ordre et de bon gouvernement, le juge en chef Laskin, à l'avis duquel ont souscrit les juges Judson, Spence et Dickson, s'est référé, en l'approuvant tacitement, à l'opinion incidente du vicomte Simon dans l'arrêt *Canada Temperance Federation*, mais il a indiqué que même s'il jugeait, comme il l'a fait, la Loi valide en fonction de la théorie de la situation d'urgence, en tant que loi "de temps de crise", il n'avait pas l'intention d'exprimer une opinion sur sa validité éventuelle selon la théorie de l'intérêt national, sur laquelle le procureur général du Canada s'était principalement fondé. Il dit, à la p. 419: "Si oui (s'il s'agit d'une loi de temps de crise), il n'est pas nécessaire d'examiner le moyen plus large proposé à l'appui de la validité, étant donné que, surtout dans les affaires constitutionnelles, les tribunaux doivent s'abstenir, règle générale, d'exprimer des avis qui ne sont pas nécessaires pour la décision du litige principal qui leur est soumis". Il a néanmoins fait observer qu'il ne jugeait pas sage de tenter de définir la portée de la compétence fédérale en matière de paix, d'ordre et de bon gouvernement en des termes si précis ou fixes qu'il deviendrait impossible de l'appliquer à des circonstances changeantes ou imprévues. De plus, certains indices portent à croire qu'il était disposé à chercher une théorie unifiée de la compétence en matière de paix, d'ordre et de bon gouvernement et qu'il considérait la théorie de la situation d'urgence comme une application particulière de la théorie de l'intérêt national. Se référant à l'emploi de l'expression (TRADUCTION) "situation d'urgence" dans l'arrêt *Fort Frances Pulp & Power Co. v. Manitoba Free Press Co.*, (1923) A.C. 695, il affirme à la p. 407: "Il s'agit d'un cas où s'applique spécialement ce que lord Watson a dit dans l'arrêt *Local Prohibition* ..."

Le juge Ritchie, à l'avis duquel ont souscrit les juges Martland et Pigeon, a conclu que la validité de la Loi ne pouvait être fondée que sur la théorie de la situation d'urgence justifiant l'exercice de la compétence en matière de paix, d'ordre et de bon gouvernement et que la théorie de l'intérêt national, en l'absence de situation d'urgence nationale, ne pouvait conférer au Parlement compétence dans des matières qui relèveraient par ailleurs de la compétence législative des provinces. Il s'est dit d'accord avec les propos du juge Beetz au sujet de la théorie de l'intérêt national. Le juge Beetz, à l'avis duquel a souscrit le juge de Grandpré, s'est vu dans l'obligation d'examiner l'argument fondé sur la théorie de l'intérêt national, puisqu'il était d'avis que la validité de la *Loi anti-inflation* ne pouvait être fondée sur une situation d'urgence nationale. Il a conclu que la théorie de l'intérêt national s'applique, en l'absence de situation d'urgence nationale, aux matières uniques, indivisibles, qui ne relèvent d'aucun des chefs spécifiés de compétence législative provinciale ou fédérale. Il a jugé que l'endiguement et la réduction de l'inflation ne satisfont pas au critère de l'unicité ou de l'indivisibilité. Se référant à l'aéronautique, à la radiocommunication et à l'aménagement de la région de la Capitale nationale, à titre de sujets d'intérêt national distinct, il dit, à la p. 458.

> Je ne vois pas comment les arrêts qui en ont ainsi décidé peuvent être invoqués à l'appui du premier moyen. Ces arrêts ont eu pour effet d'ajouter par voie jurisprudentielle de nouvelles matières ou de nouvelles catégories de matières à la liste des pouvoirs fédéraux spécifiques. Cependant la jurisprudence n'en a ainsi décidé que dans des cas où la nouvelle matière n'était pas un agrégat mais présentait un degré d'unité qui la rendait indivisible, une identité qui la rendait distincte des matières provinciales et une consistance suffisante pour retenir les limites d'une forme. Il fallait aussi, avant de reconnaître à ces nouvelles matières le statut de matières de compétence fédérale, tenir compte de la mesure dans laquelle elles permettraient au Parlement de toucher à des matières de compétence provinciale: si un pouvoir fédéral désigné à l'art. 91 en termes généraux, tel que le pouvoir relatif aux échanges et au commerce, doit, selon la jurisprudence, être interprété de façon à ne pas embarasser et anéantir les pouvoirs provinciaux (arrêt Parsons) et détruire ainsi l'équilibre de la Constitution, les tribunaux doivent à plus forte raison se garder d'ajouter des pouvoirs de nature diffuse à la liste des pouvoirs fédéraux.
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> "L'endiguement et la réduction de l'inflation" n'est pas acceptable comme nouvelle matière. C'est un agregat de sujet divers dont certains représentent une partie importante de la compétence provinciale. C'est une matière totalement dépourvue de spécificité et dont le caractère envahissant ne connaît pas de limites; en faire l'objet d'une compétence fédérale rendait illusoires la plupart des pouvoirs provinciaux.
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> Il est bon de rappeler également que l'inflation est un phénomène fort ancien, datant de plusieurs milliers d'années, aussi ancien probablement que la monnaie elle-même. Les Pères de la Confédération en étaient bien conscients.

Dans l'arrêt *Hauser*, la Cour à la majorité (les juges Martland, Ritchie, Pigeon et Beetz) a jugé que la constitutionnalité de la *Loi sur les stupéfiants* reposait sur la compétence du Parlement en matière de paix, d'ordre et de bon gouvernement plutôt que sur sa compétence en matière de droit criminel. Le juge Pigeon, qui a rendu les motifs de la majorité, a affirmé que la principale considération appuyant ce point de vue est que l'abus des stupéfiants, dont traite la Loi, constitue un problème récent qui n'existait pas à l'époque de la Confédération et qu'étant donné qu'il ne peut être assimilé aux matières de nature purement locale ou privée dans la province, il relève de la "compétence résiduaire générale" tout comme l'aéronautique et la radiocommunication.

Dans l'arrêt *Brasserie Labatt*, où la Cour, siégeant au complet, à jugé à la majorité que certaines dispositions de la *Loi des aliments et drogues* et de son règlement d'application étaient inconstitutionnelles, le juge Estey, à l'avis duquel ont souscrit les juges Martland, Dickson et Beetz, a eu à étudier la compétence en matière de paix, d'ordre et de bon gouvernement en tant que fondement éventuel de validité. Il a résumé la jurisprudence relative à ce fondement de la compétence législative fédérale, en la subdivisant en trois catégories: a) les arrêts "qui fonde(nt) la compétence fédérale sur l'existence d'une situation d'urgence nationale", b) les arrêts où "la question de la compétence fédérale a été soulevé parce que la matière n'existait pas à l'époque de la Confédération et ne peut manifestement pas être placée dans la catégories des sujets de nature purement locale ou privée", citant, à titre d'exemples, l'aéronautique de la radiocommunication; et c) les arrêts où "la matière "dépasse les préoccupations ou les intérêts locaux ou provinciaux et doit par sa nature même constituer une préoccupation pour le Dominion dans son ensemble"", citant l'arrêt *Canada Temperance Federation*. Ainsi, le juge Estey a considéré que la théorie de l'intérêt national énoncée dans l'arrêt *Canada Temperance Federation* visant non pas le cas d'une nouvelle matière qui n'existait pas à l'époque de la Confédération, mais celui d'une matière qui, au départ, pouvait avoir été d'intérêt local ou provincial, mais qui avait revêtu par la suite un intérêt national. Il a mentionné cette catégorie comme étant "une question d'intérêt national transcendant le pouvoir des autorités locales d'y faire face par voie législative", et a cité à l'appui de cette formulation du critère un passage de l'ouvrage du professeur Hogg, intitulé *Constitutional Law of Canada* (1977), à la p. 261, où l'on dit que (TRADUCTION) "l'élément le plus important de la dimension nationale ou de l'intérêt national est le besoin d'une loi nationale, but qu'une action concertée des provinces ne peut atteindre de façon réaliste, car le défaut de coopération de l'une d'elles entraînerait des conséquences graves pour les habitants des autres provinces."

Dans l'arrêt *Schneider*, où la Cour a jugé à l'unanimité que *l'Heroin Treatment Act* de la Colombie-Britannnique était constitutionnelle, le juge Dickson (maintenant Juge en chef), à l'avis duquel ont souscrit les juges Martland, Ritchie, Beetz, McIntyre, Chouinard et Lamer, à indiqué, particulièrement au sujet de la théorie de l'intérêt national et de ce qu'on en est venu à appeler le critère de l'"incapacité provinciale", pourquoi il était d'avis que le traitement des héroinomanes, par opposition au trafic des stupéfiants, ne relève pas de la compétence fédérale en matière de paix, d'ordre et de bon gouvernement. Il traite ainsi du problème de l'héroinomanie, aux pp. 131 et 132:

> Il s'agit surtout d'un problème local ou provincial qui n'est pas encore devenu une question d'intérêt national qui relèverait de la compétence du Parlement du Canada en vertu du pouvoir résiduel conféré par le préambule de l'A.A.N.B. (maintenant *Loi constitutionnelle de 1867*).
>
> Aucun élément de preuve devant la Cour ne permet de conclure que le problème de la dépendance à l'égard de l'héroine par opposition au commerce illégal des drogues constitue une question d'intérêt et d'envergure nationaux qui transcende le pouvoir de chaque province d'y faire face et de la résoudre de sa propre façon. Ce n'est pas un problème qui (TRADUCTION) "dépasse la capacité des provinces de s'en occuper" (le professeur Gibson (1976-77) 7 Man. L.J. 15, à la p. 33). L'omission d'une province d'établir des services de cure ne met pas en péril les intérêts d'une autre province. Il ne s'agit pas d'une

> question qui (TRADUCTION) "a atteint des dimensions telles qu'elle affecte le corps politique du Dominion" (In *re Regulation and Control of Aeronautics in Canada*, (1932) A.C. 54, à la p. 77. Il ne s'agit pas de quelque chose qui (TRADUCTION) "dépasse les préoccupations ou intérêts locaux ou provinciaux et qui doit en soi intéresser tout le Dominion (comme par exemple, dans l'affaire de l'aéronautique et celle de la radiocommunication)" selon les termes du vicomte Simon dans *Attorney-General for Ontario* v. *Canada Temperance Federation*, (1946) A.C. 193, at p. 205. Voir également *Johannesson c. Rural Municipality of West St. Paul*, (1952) 1 R.C.S.. 292; *Munro c. Commission de la Capitale nationale*, (1966) R.C.S. 663; *Re C.F.R.B. and Attorney General for Canada*, (1973) 3 O.R. 819. On ne peut affirmer non plus, d'après le dossier, que le problème de l'héroinomanie est devenu urgent au point de justifier le recours à la compétence du fédéral en vertu du pouvoir résiduel.
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> Je ne crois pas que la question des stupéfiants soit si globale et indivisible qu'on ne puisse pas diviser la compétence législative en attribuant au Parlement du Canada la compétence sur le commerce illégal des stupéfiants et aux provinces la compétence sur le traitement ou la cure des toxicomanes.

Dans l'arrêt *Wetmore*, où la question était de savoir si le procureur général du Canada pouvait diriger des poursuites pour la violation de la *Loi des aliments et drogues*, le jude Dickson, dissident, s'est demandé si les dispositions applicables de la Loi des aliments et drogues avaient leur fondement constitutionnel dans la compétence fédérale en matière de droit criminel ou, comme on l'avait conclu dans l'arrêt *Hauser* relativement à la *Loi sur les stupéfiants*, dans la compétence en matière de paix, d'ordre et de bon gouvernement. En rejetant ce dernier fondement de compétence, il s'est référé à ce qui avait été dit au sujet de la théorie de l'intérêt national justifiant l'exercice de la compétence en matière de paix, d'ordre et de bon gouvernement dans le Renvoi: *Loi anti-inflation*, et dans les arrêts Labatt et Hauser, aux pp. 294 et 295:

> Dans le *Renvoi sur la Loi anti-inflation*, (1976) 2 R.C.S. 373, le juge Beetz, dont le jugement sur ce point a reçu l'appui de la majorité, a examiné la jurisprudence abondante sur la question et a conclu que la compétence en matière de paix, d'ordre et de bon gouvernement doit se limiter à justifier (i) des lois provisoires relatives à une situation d'urgence nationale (p. 459) et (ii) des lois relatives à des "sujets distincts qui ne se rattachent à aucun des paragraphes de l'art. 92 et qui, de par leur nature, sont d'intérêt national" (p 457). Dans l'arrêt *Labatt* précité, aux pp. 944 et 945, le juge Estey a divisé ce second chef ainsi: (i) les domaines dans lesquels la question de la compétence fédérale est soulevée parce que la matière n'existait pas à l'époque de la Confédération et ne peut être placée dans la catégorie des sujets de nature purement locale ou privée, et (ii) les domaines où la matière "dépasse les intérêts locaux ou provinciaux et doit par sa nature même constituer une préoccupation pour le Dominion dans son ensemble". Cette dernière catégorie est celle énoncée par le vicomte Simon dans l'arrêt *Attorney General for Ontario* v. *Canada Temperance Federation*, (1946) A.C. 193, à la p. 205. La catégorie précédente constitue le fondement de la décision de la majorité dans l'arrêt Hauser que la Loi sur les stupéfiants, S.R.C. 1970, chap. N-1, relève de la compétence relative à la paix, à l'ordre et au bon gouvernement puisqu'elle vise "un problème récent qui n'existait pas à l'époque de la Confédération".

Appliquant ces principes à la matière visée par la *Loi des aliments et drogues*, le juge Dickson a fait observer qu'il n'était pas question d'une situation d'urgence ni d'une nouvelle matière qui n'existait pas à l'époque de la Confédération et il a rejeté la théorie de l'intérêt national justifiant l'exercice de la compétence en matière de paix, d'ordre et de bon gouvernement comme fondement de la constitutionnalité des dispositions en cause, pour les raisons suivantes, à la p. 296:

> Enfin, on ne peut soutenir que l'al. 8a), le par. 9(1) et l'art. 26 visent une matière qui dépasse les intérêts locaux ou provinciaux et qui, de par sa nature même, doit constituer une préoccupation pour le Dominion dans son ensemble, suivant l'interprétation que les arrêts donnent à ce concept. De toute évidence, leur objet ne répondrait pas aux exigences dont parle le juge Beetz dans le Renvoi sur la Loi anti-inflation, précité, et ne satisferait pas aux critères proposés par Hogg dans un passage de son ouvrage *Constitutional Law of Canada* (1977), à la p. 261, que cite le juge Estey dans l'arrêt *Labatt*, précité, à la p. 945:
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> (TRADUCTION) Ces décisions laissent entendre que l'élément le plus important de la dimension nationale ou de l'intérêt national est le besoin d'une loi nationale, but qu'une action concertée des provinces ne peut atteindre de façon réaliste, car le défaut de coopération de l'une d'elles entraînerait des conséquences graves pour les habitants des autres provinces. Une matière législative qui a ce caractère possède la dimension nationale ou l'intérêt national nécessaires pour justifier le recours à la compétence relative à la paix, à l'ordre et au bon gouvernement.
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> Les mêmes facteurs qui empêchent l'al. 8a) et le par. 9(1) d'être considérés comme une "réglementation générale des échanges s'appliquant à tout le Dominion" les empèchent également d'être considérés comme se rapportant à la paix, à l'ordre et au bon gouvernement suivant le critère de l'arrêt Canada Temperance. Si ce n'est qu'elles sont censées s'appliquer à tout le Canada et mises à part certaines difficultés financières et logistiques que soulève l'adoption de textes de loi provinciaux comparables, ces dispositions n'ont en soi rien de "national". Et comme le démontre une série d'arrêts depuis le renvoi *Re Insurance Act* 1910 (1913), 48 R.C.S. 260, confirmé à (sub nom. *Attorney-General for Canada v. Attorney-General for Alberta (Renvoi sur les assurances))* (1916) 1 A.C. 588, jusqu'à l'arrêt *Labatt*, précité, aucun de ces critères, pris séparément ou ensemble, ne suffit à valider une loi fédérale adoptée en vertu de la compétence relative à la paix, à l'ordre et au bon gouvernement.

De ce survol des opinions exprimées par cette Cour concernant la théorie de l'intérêt national justifiant l'exercice de la compétence fédérale en matière de paix, d'ordre et de bon gouvernement, je tire les conclusions suivantes sur ce qui paraît maintenant fermement établi:

1. La théorie de l'intérêt national est séparée et distincte de la théorie de la situation d'urgence nationale justifiant l'exercice de la compétence en matière de paix, d'ordre et de bon gouvernement, qui peut se distinguer surtout par le fait qu'elle offre un fondement constitutionnelle à ce qui est nécessairement une mesure législative provisoire;

2. La théorie de l'intérêt national s'applique autant à de nouvelles matières qui n'existaient pas à l'époque de la Confédération qu'à des matières qui, bien qu'elles fussent à l'origine de nature locale ou privée dans une province, sont depuis devenues des matières d'intérêt national, sans qu'il y ait situation d'urgence nationale;

3. Pour qu'on puisse dire qu'une matière est d'intérêt national dans un sens ou dans l'autre, elle doit avoir une unicité, une particularité et une indivisibilité qui la distinguent clairement des matières d'intérêt provincial, et un effet sur la compétence provinciale qui soit compatible avec le partage fondamental des pouvoirs législatifs effectué par la Constitution;

4. Pour décider si une matière atteint le degré requis d'unicité, de particularité et d'indivisibilité qui la distingue clairement des matières d'intérêt provincial, il est utile d'examiner quel effet aurait sur les intérêts extraprovinciaux l'omission d'une province de s'occuper efficacement du contrôle ou de la réglementation des aspects intraprovinciaux de cette matière.

Ce dernier facteur, généralement appelé le critère de l'"incapacité provinciale", que la Cour a noté et, semble-t-il, approuvé dans les arrêts *Labatt, Schneider et Wetmore*, a été proposé, comme le reconnaît le professeur Hogg, par le professeur Gibson dans son article intitulé "Measuring "National Dimensions"" (1976), 7 Man. L.J. 15, comme l'explication la plus satisfaisante des cas où la théorie de l'intérêt justifiant l'exercice de la compétence en matière de paix, d'ordre et de bon gouvernement a été appliquée comme fondement de la compétence fédérale. Comme l'a exposé le professeur Gibson, le critère semblerait comporter une application limitée, voire conditionnelle, de la compétence fédérale. Comme il l'affirme, aux pp. 34 et 35, (TRADUCTION) "Selon ce point de vue, il y aurait dimension nationale chaque fois qu'un aspect important d'un problème est hors de portée provinciale parce qu'il relève de la compétence d'une autre province ou du Parlement fédéral. Cependant, il importe de souligner que ce ne serait pas le problème en entier qui relèverait de la compétence fédérale dans de telles circonstances. C'est uniquement l'aspect du problème qui échappe au contrôle provincial qui en relèverait. Comme la clause "paix, ordre et bon gouvernement" ne confère que des pouvoirs résiduaires, l'existence d'une dimension nationale ne justifie une mesure législative fédérale que dans la mesure où cela est nécessaire pour combler une lacune dans les pouvoirs provinciaux. Par exemple, la compétence fédérale pour légiférer en matière de pollution des voies navigables interprovinciales ou pour contrôler les "guerres de prix de la pollution" ne s'étendrait (en l'absence d'autres sources indépendantes de compétence fédérale) qu'aux mesures de réduction du danger que les citoyens d'une province subissent un préjudice par suite de l'absence de coopération de la part d'une seule ou de plusieurs autres provinces." Dans le même sens, il déclare en conclusion, à la p. 36: (TRADUCTION) "Comme tenu de la nature résiduaire de la compétence, l'auteur a pour thèse que ne revêtent des "dimensions nationales" que les aspects des problèmes législatifs que les assemblées législatives provinciales ne peuvent régler parce qu'ils font intervenir soit une compétence fédérale, soit celle d'une autre province. Lorsqu'il est possible de régler le problème par l'action conjuguée de deux ou plusieurs assemblées législatives, la "dimension nationale" ne peut viser que le risque de non-coopération et ne justifie qu'une mesure législative fédérale portant sur ce risque." On semblerait ainsi envisager une compétence fédérale concurrente ou superposée, ce qui, je dois le rappeler, est incompatible avec ce que soulignait le juge Beetz dans le *Renvoi: Loi anti-inflation*, savoir que lorsqu'une matière relève de la théorie de l'intérêt national justifiant l'exercice de la compétence en matière de paix, d'ordre et de bon gouvernement, par opposition à la théorie de la situation d'urgence, le Parlement jouit d'une compétence exclusive et absolue pour légiférer sur cette matière, y compris sur ses aspects intraprovinciaux.

Comme l'a dit le professeur Hogg dans les première et deuxième éditions de son ouvrage intitulé *Constitutional Law of Canada*, le critère de l'"incapacité provinciale" semblerait avoir été adopté simplement pour permettre de constater qu'une matière particulière revêt un intérêt national et relève ainsi de la compétence en matière de paix, d'ordre et de bon gouvernement: l'omission d'une province de s'occuper efficacement des aspects intraprovinciaux de la question pourrait avoir un effet préjudiciable sur des intérêts extraprovinciaux. En ce sens, le critère de l'"incapacité provinciale" est l'un des indices qui permettent de déterminer si une matière revêt le caractère d'unicité et d'invisibilité nécessaire pour relever de la théorie de l'intérêt national. C'est à cause de la corrélation des aspects intraprovinciaux et extraprovinciaux de la question qu'elle requiert un traitement législatif unique ou uniforme. Le critère de l'"incapacité provinciale" ne doit pas, toutefois, aller jusqu'à justifier la notion générale, jusqu'ici rejetée par la jurisprudence, qu'un palier ou l'autre de gouvernement doit avoir une compétence absolue pour régler un problème législatif. Dans le contexte de la théorie de l'intérêt national justifiant l'exercice de la compétence en matière de paix, d'ordre et de bon gouvernement, son utilité réside, à mon avis, dans le fait qu'il aide à déterminer si une matière possède l'unicité ou l'indivisibilité requise tant du point de vue pratique que du point de vue conceptuel.

Avant de passer à la question de savoir si la pollution causée par l'immersion de substances dans les eaux de la mer, y compris celles situées à l'intérieur d'une province, possède l'unicité ou l'indivisibilité requise pour relever de la théorie de l'intérêt national justifiant l'exercice de la compétence en matière de paix, d'ordre et de bon gouvernement, il conviendrait de réitérer l'opinion que trois membres de cette Cour ont exprimée, dans l'arrêt *Interprovincial Co-operatives*, précité, sur la compétence fédérale en matière de pollution des cours d'eau interprovinciaux, en raison de l'importance particulière que lui a accordée le procureur général du Canada. L'affaire concernait la validité de *The Fishermen's Assistance and Polluters' Liability Act* du Manitoba, qui établissait une responsabilité pour les dommages causés aux pêcheries dans les eaux de la province par un polluant déversé, sans excuse légitime, dans des eaux à l'extérieur de la province qui l'ont charrié dans les eaux de la province. La Loi prévoyait en outre que la preuve (TRADUCTION) "que le déversement du polluant a été autorisé par l'organisme de contrôle compétent à l'endroit où le déversement s'est effectué ne constitu(ait) pas une excuse légitime si cet organisme n'(était) pas également compétent à l'endroit où le polluant a causé des dommages aux pêcheries". Une action avait été intentée pour les dommages causés aux pêcheries du Manitoba par le mercure déversé dans les eaux de la Saskatchewan et de l'Ontario, puis charrié par l'écoulement naturel de ces eaux dans celles du Manitoba. Le juge Pigeon, à l'avis duquel ont souscrit les juges Martland et Beetz, a conclu qu'il n'entrait pas dans la compétence législative de la province de créer, par une loi, un droit d'action pour les dommages causés dans la province par des actes commis à l'extérieur de la province, tout comme il n'était pas de la compétence d'une province d'autoriser dans la province des actes ayant causé des dommages dans une autre province. Faisant observer qu'"Ici nous sommes en présence d'un problème de pollution qui n'est pas réellement de portée locale mais véritablement interprovinciale" (p. 514), le juge Pigeon a conclu que le contrôle de la pollution des cours d'eau interprovinciaux relève du pouvoir résiduaire que possède le Parlement, aux termes de sa compétence en matière de paix, d'ordre et de bon gouvernement. Vu la nature de la mesure législative manitobaine et compte tenu des faits de l'espèce, je pense qu'on doit présumer, comme le soutient l'intimée, qu'en mentionnant la pollution des cours d'eau interprovinciaux, le juge Pigeon avait à l'esprit la pollution qui franchissait les frontières provinciales. En outre, l'opinion selon laquelle il y avait compétence fédérale, fondée sur la compétence en matière de paix, d'ordre et de bon gouvernement, pour contrôler la pollution des cours d'eau interprovinciaux, n'était pas celle de la majorité de la Cour. Le juge Ritchie, autre juge formant la majorité favorable à l'accueil du pourvoi, a exprimé l'avis que la loi manitobaine était inapplicable aux défenderesses, dans la mesure où elle cherchait à nier un droit ayant pris naissance à l'extérieur de la province, mais il a refusé de conclure, avec le juge Pigeon, qu'elle était inconstitutionnelle parce que relative à une matière de compétence législative fédérale, un point qui, a-t-il dit, n'avait pas été débattu. Dans ses motifs, il a exprimé l'opinion que le Parlement a compétence en matière de contrôle de la pollution des cours d'eau interprovinciaux, mais il ne s'est référé qu'au par. 91(12) de la *Loi constitutionnelle de 1867* pour justifier cette compétence.

V

La pollution des mers, à cause de son caractère et de ses incidences extraprovinciales surtout, mais aussi internationales, est manifestement une matière qui intéresse le Canada tout entier. La question est de savoir si le contrôle de la pollution résultant de l'immersion de substances dans les eaux de la mer, y compris dans les eaux de la mer situées dans une province, constitue une matière unique et indivisible, distincte du contrôle de la pollution due à l'immersion de substances dans d'autres eaux provinciales. La *Loi sur l'immersion de déchets* en mer reflète une distinction entre la pollution des eaux salées et celle des eaux douces. La question, telle que je la conçois, est de savoir si cette distinction suffit à faire du contrôle de la pollution des mers due à l'immersion de substances une matière unique et indivisible qui relève de la théorie de l'intérêt national justifiant l'exercice de la compétence en matière de paix, d'ordre et de bon gouvernement.

De toute évidence, la *Convention sur la prévention de la pollution des mers résultant de l'immersion de déchets* traite la pollution des mers due à l'immersion de substances comme une forme séparée et distincte de pollution de l'eau, comportant ses propres caractéristiques et présentant des considérations scientifiques spécifiques. Cette impression est renforcée par le rapport du groupe conjoint d'experts sur les aspects scientifiques de la pollution des mers des Nations unies, Reports and Studies No. 15, *The Review of the Health of the Oceans* (Unesco 1982) (ci-après le rapport des Nations unies") qui fait partie de la documentation dont la Cour a été saisie au cours du débat. Toutefois, il faut souligner que, contrairement à la *Loi sur l'immersion de déchets en mer*, la Convention n'exige pas la réglementation de la pollution résultant de l'immersion de déchets dans les eaux de la mer qui forment les eaux intérieures d'un État. Le paragraphe 3 de l'article III de la Convention définit la "mer" comme étant "toutes les eaux marines à l'exception des eaux intérieures des États". Les eaux de la mer qui forment les eaux intérieures d'un État sont celles situées en déça de la ligne de base de la mer territoriale, laquelle est déterminée conformément aux règles énoncées dans la *Convention des Nations Unies sur le droit de la mer* (1982). La restriction apportée au contrôle que la Convention, présumément pour des raisons de politique gouvernementale, cherche à exercer sur les immersions dans la mer territoriales et en haute mer ne saurait, à mon avis, obscurcir le lien mainfestement étroit, que souligne le rapport des Nations unies, existant entre la pollution des eaux côtières, y compris les eaux de la mer qui forment les eaux intérieures d'un État, et la pollution de la mer territoriale. De plus, je considère bien valable l'argument de l'appelante portant que la difficulté de vérifier de visu la limite entre la mer territoriale et les eaux de la mer qui forment les eaux intérieures d'un État, suscite un degré inacceptable d'incertitude quand il s'agit d'appliquer des dispositions réglementaires et pénales. C'est cela, et non la seule possibilité ou probabilité que des polluants traversent cette limite, qui constitue l'indivisibilité essentielle de cette manière qu'est la pollution des mers résultant de l'immersion de substances.

Reste la question de savoir si la pollution des eaux de la mer résultant de l'immersion de substances peut suffisamment se distinguer de la pollution des eaux douces due à de telles immersions pour satisfaire à l'unicité ou à l'indivisibilité requises. Dans bien des cas, la pollution des eaux douces a pour effet de polluer les eaux de la mer dans lesquelles elles se déversent, ce que note le rapport des Nations unies; mais ce rapport, comme je l'ai laissé entendre, souligne que la pollution de la mer, à cause des différences qui existent entre les eaux de la mer et les eaux douces sur le plan de leur composition et de leur action, comporte ses propres caractéristiques et présente des considérations scientifiques spécifiques qui la distinguent de la pollution des eaux douces. En outre, la distinction entre eaux salées et eaux douces, pour limiter l'application de la *Loi sur l'immersion de déchets en mer*, satisfait au critère sur lequel la Cour, à la majorité, a insisté dans le *Renvoi: Loi anti-inflation*, savoir que pour qu'on puisse dire qu'une matière revêt un intérêt national et relève de la compétence fédérale en matière de paix, d'ordre et de bon gouvernement, elle doit comporter des limites vérifiables et raisonnables, pour ce qui est de son incidence sur la compétence provinciale.

Pour ces motifs, je suis d'avis que le par. 4(1) de la *Loi sur l'immersion de déchet en mer* est constitutionnel, parce qu'il porte sur une matière relevant de la théorie de l'intérêt national qui justifie l'exercice de la compétence que possède le Parlement du Canada en matière de paix, d'ordre et de bon gouvernement, et en particulier, que son application à l'immersion de déchets dans les eaux de Beaver Cove est constitutionnelle. Par conséquent, je suis d'avis d'accueillir le pourvoi, d'annuler l'arrêt de la Cour d'appel et le jugement du juge Schmidt et de renvoyer l'affaire au juge de la Cour provinciale. Je suis d'avis de donner la réponse suivante à la question constitutionnelle:

> Le paragraphe 4(1) de la *Loi sur l'immersion de déchets en mer*, S.C. 1974-75-76, chap. 55, est-il *ultra vires* du Parlement du Canada, et, en particulier, est-il *ultra vires* du Parlement du Canada dans son application à l'immersion de déchets dans les eaux de Beaver Cove, à l'intérieur des frontières de la Colombie-Britannique?
>
> Réponse: Non.

COUR SUPRÊME DU CANADA

SA MAJESTÉ LA REINE C. CROWN ZELLERBACH CANADA LIMITED

- ET -

LE PROCUREUR GÉNÉRAL DU QUÉBEC ET LE PROCUREUR GÉNÉRAL DE LA COLOMBIE-BRITANNIQUE

CORAM: Le Juge en chef et les juges Beetz, McIntyre, Lamer, Wilson, Le Dain et La Forest.

LE JUGE LA FOREST:

La question qui se pose dans ce pourvoi concerne la mesure dans laquelle le Parlement fédéral peut constitutionnellement interdire l'immersion de substances, dont il n'est pas démontré qu'elles ont pour effet de polluer les eaux de la mer, au large de la côte, mais dans les limites d'une province.

Les faits

Mon collègue le juge Le Dain a exposé les faits, la législation applicable et l'historique des procédures, aussi me suffira-t-il de ne rappeler que les plus saillants de ces aspects factuels.

L'intimée, Crown Zellerbach Canada Limited, est accusée d'avoir procédé à une "immersion" contrairement au par. 4(1) de la *Loi sur l'immersion de déchets en mer*, S.C. 1974-75-76, chap. 55, qui dispose purement et simplement qu'il ne peut être procédé à des immersions qu'en conformité avec un permis. Le terme "immersion" est défini au par. 2(1) de la Loi comme "tout rejet délibéré de substances à partir de navires, aéronefs, plates-formes ou autres ouvrages placés en mer ... " (je souligne).

Voici brièvement les faits sur lesquels l'accusation est fondée. Dans le cadre de l'exploitation de son entreprise de coupe de bois sur l'île de Vancouver (Colombie-Britannique), l'intimée Crown Zellerbach a précédé au dragage du fond de la mer le long du rivage, à son point de déboulement sur un plan d'eau loué à la province, à Beaver Cove, pour déposer dans les eaux plus profondes de l'anse, à quelque 60 à 80 pieds au large, les résidues de bois dragués consistant en débris imbibés d'eau comme des morceaux d'écorce, de bois et de dosses. Il n'existe aucune preuve qu'il y ait eu dispersion des résidues de bois ni que cela ait eu un effet quelconque sur la navigation ou sur la faune et la flore marines. L'intimée était titulaire d'un permis d'immersion délivré en vertu de la Loi, mais ce permis ne l'autorisait pas à procéder à des immersions à ce nouvel endroit. Les eaux de Beaver Cove sont *inter fauces terrae*, les rives à son entrée étant distantes d'environ un demi-mille; elles sont navigables et se jettent dans le détroit de Johnstone qui communique avec le Pacifique.

On n'a pas contesté que le lit de la mer au point d'immersion est situé dans la province et lui appartient; *Renvoi relatif à la propriété du lit du détroit de Géorgie et des régions avoisinantes*, (1984) 1 R.C.S. 388. D'après l'intimée, les eaux de Beaver Cove sont à plus de 100 km des eaux extraprovinciales. Toutefois, l'application de la Loi ne s'en trouve pas resteinte, car la "mer" où les immersions sont interdites n'est pas confinée à la mer territoriale ni aux zones de mer situées au-delà de celle-ci mais, en vertu de l'al. 292)b) de la Loi, elle comprend les eaux intérieures du Canada à l'exclusion des eaux intérieures des États". Je ne comprends pas comment le fait que le Parlement a choisi d'adopter un régime semblable pour les eaux intérieures non visées par la Convention peut internes (voir le par. 2(3)), c'est-à-dire les eaux de la mer sises entre la côte et la ligne de base de la mer territoriale.

Devant les tribunaux d'instance inférieure, l'intimée a contesté la validité du par. 4(1), pour le motif qu'il outrepasse la compétence législative fédérale et qu'il empiète sur un domaine de compétence provinciale. Comme mon collègue l'a indiqué, les tribunaux d'instance inférieure ont accepté cet argument. Sa Majesté du chef du Canada s'est pourvu devant cette Cour afin de faire déclarer la disposition valide. L'intimée continue de maintenir que la disposition est invalide, mais elle ajoute que, de toute façon, elle ne devrait pas s'appliquer aux faits en l'espèce.

La question constitutionnelle à trancher est ainsi conçue:

> Le paragraphe 4(1) de la *Loi sur l'immersion de déchets en mer*, S.C. 1974-75-76, chap. 55, est-il *ultra vires* du Parlement du Canada, et, en particulier, est-il *ultra vires* du Parlement du Canada dans son application à l'immersion de déchets dans les eaux de Beaver Cove, à l'intérieur des frontières de la Colombie-Britannique?

Les processus généraux de la Colombie-Britannique et du Québec sont intervenus à l'appui du point de vue selon lequel le par. 4(1) est constitutionnellement inapplicable aux eaux intérieures situées dans une province.

Les questions en litige

L'argumentation de l'appelante porte principalement que l'objet de la *Loi sur l'immersion de déchets en mer* est le contrôle de la pollution du milieu marin. Le contrôle de la pollution du milieu marin, soutient l'avocat de l'appelante, est une question qui dépasse les intérêts provinciaux ou locaux et constitue une question nationale qui intéresse le Canada tout entier et qui, à ce titre, relève de la compétence législative du Parlement en matière de paix, d'ordre et de bon gouvernement du Canada. Dans l'exercice de sa compétence relative au contrôle de la pollution du milieu marin, poursuit-il, le Parlement peut interdire l'immersion de toute substance, polluante ou non, même dans les zones de la mer situées à l'intérieur des limites d'une province. Je compte examiner cette question importante plus loin, me limitant, pour le moment, à une analyse des autres points soulevés par les parties.

Comme point subsidiaire à l'appui de son argument principal, l'avocat de l'appelante invoque un certain nombre de chefs de compétence qu'énonce l'art. 91 de la *Loi constitutionnelle de 1867* relativement à la mer, comme illustrant le genre de matières qui relèvent de la compétence législative générale du Parlement fédéral, à savoir, plus précisément, la navigation et les expéditions par eau (par. 91(10)), les amarques, les bouées et les phares (par. 91(9)), les passages d'eau interprovinciaux et internationaux (par. 91(13)), et les pêcheries des côtes de la mer et de l'intérieur (par. 91(12)). Cet argument subsidiaire, si je puis m'exprimer ainsi, prouve à la fois trop peu et trop de choses. Le paragraphe 91(9)), par exemple, n'inclut pas les passages d'eau intraprovinciaux et le par 91(12) inclut expressément à la fois les pêcheries de la mer et des eaux douces. Le juge Beetz (dissident, mais s'exprimant sur ce point au nom des juges formant la majorité) a rejeté d'emblée un argument similaire dans le *Renvoi: Loi anti-inflation*, (1976) 2 R.C.S. 373, aux pp. 458 et 459.

Devant cette Cour, l'avocat de l'appelante a par ailleurs évité d'invoquer les compétences législatives en matière de pêcheries ou de navigation pour justifier le par. 4(1). Ces arguments, comme l'ont jugé les tribunaux d'instance inférieure, sont intenables compte tenu de l'arrêt de cette Cour *Fowler c. La Reine*, (1980) 2 R.C.S. 213. Dans cet arrêt, la Cour a jugé inconstitutionnel le par. 33(3) de la *Loi sur les pêcheries* fédérale, S.R.C. 1970, chap. F-14, qui interdisait à quiconque faisait l'abattage, la coupe de bois ou d'autres opérations, de déposer des résidus de bois dans des eaux fréquentées par le poisson. Le juge Martland a clairement affirmé, au nom de la Cour, que pour que la disposition pût être justifiée à titre de mesure législative en matière de pêcheries, il devait y avoir un lien entre la conduite prohibée et les dommages réels ou probables que les pêcheries pourraient subir. Pour reprendre ses termes: "C'est une interdiction générale d'exercer certaines activités de compétence provinciale; ce paragraphe ne fixe pas les éléments de l'infraction de manière à établir un lien entre l'interdiction et les dommages vraisemblables aux pêcheries." (p. 226). Comme en l'espèce, il n'y avait aucune preuve qu'un lien de ce genre existait. On peut opposer ces deux affaires à l'arrêt *Northwest Falling Contractors Ltd. c. la Reine*, (1980) 2 R.C.S. 292, où la Cour a confirmé la validité du par. 33(2) de la *Loi sur les pêcheries*, qui interdit le dépôt de toute substance nocive dans des eaux poissonneuses.

Il y a peut-être encore moins d'éléments qui permettent d'établir un lien entre l'interdiction en l'espèce et la navigation. L'interdiction ne vise manifestement pas la navigation et il n'y a aucune preuve qui démontre que les immersions nuisent de quelque façon à la navigabilité des eaux en question.

Selon moi, l'argument portant, dans le mémoire de l'appelante, que l'interdiction édictée au par. 4(1) est justifiable comme mesure en matière de droit criminel, n'est pas plus valable et il est significatif que l'avocat de l'appelante ait préféré l'ignorer dans sa plaidoirie. Il est possible que certaines des substances énumérées dans les annexes de la Loi soient dommageables pour la santé humaine si elles sont déversées dans l'eau et il est vrai aussi qu'une interdiction ayant vraiment pour objet de protéger la santé pourrait être justifiée comme un exercice de la compétence en matière de droit criminel; voir *Reference re Validity of Section 5(a) of the Dairy Industry Act*, (1949) R.C.S. 1, aux pp. 49 et 50. Mais il est difficile de voir comment la disposition contestée, qui interdit les immersions dans les eaux de la mer de toute substance, si inoffensive soit-elle considérée comme visant la protection de la santé.

Devant les tribunaux d'instance inférieure, l'appelante a aussi fait valoir que la disposition contestée peut être justifiée par le pouvoir fédéral de mise à exécution des traités, comme ayant été adoptée pour mettre en oeuvre la *Convention sur la prévention de la pollution des mers résultant de l'immersion* de déchets, signée par le Canada le 29 décembre 1972. Cet argument a toutefois été rejeté pour le motif que, même à supposer qu'un tel pouvoir existe, il ne pourrait servir à justifier la disposition contestée en l'espèce, compte tenu de l'affirmation du juge en chef Laskin dans l'arrêt *MacDonald c. Vapour Canada Ltd.*, (1977) 2 R.C.S. 134, pp. 171 et 172, qu'il doit y avoir dans la Loi une indication suffisamment claire qu'elle a pour but de mettre à exécution un traité. L'avocat de l'appelante n'a pas repris cet argument en cette Cour, avec raison selon moi, parce que la Convention, contrairement à la Loi, ne vise pas la pollution résultant de l'immersion de déchets dans les eaux intérieures d'un État, mais est confinée aux immersions en mer, au-delà des eaux intérieures. Le paragraphe 3 de l'article III de la Convention définit la "mer" comme étant "toutes les eaux marines à l'exception des eaux être d'une aide quelconque quand il s'agit de décider s'il a le pouvoir d'interdire les immersions dans les eaux intérieures comprises dans une province. En fait, alors que l'article premier de la Convention impose aux États contractants l'obligation générale de promouvoir le contrôle de toutes les sources de pollution du milieu marin, les mesures pratiques que ces États se sont engagés à prendre pour mettre à exécution cette obligation ne visent que l'immersion de déchets et d'autres matières susceptibles de mettre en danger la santé de l'homme, de nuire aux ressources biologiques, à la faune et à la flore marines, de porter atteinte aux agréments ou de gêner toutes autres utilisations légitimes de la mer". Je ne vois donc pas comment la Convention peut permettre de justifier une interdiction générale comme celle du par. 4(1) de la Loi.

Il reste alors l'argument de l'appelante selon lequel le par. 4(1) est valide, comme mesure législative relative à la pollution du milieu marin, en vertu de la clause en matière de paix, d'ordre et de bon gouvernement.

Pour sa part, l'intimée ne nie pas que le Parlement a le pouvoir de réglementer la pollution du milieu marin, mais elle fait valoir que le par. 4(1) de la Loi va au-delà du contrôle de la pollution des mers pour englober l'immersion de toute substance, polluante ou non. Le sujet visé par la disposition, poursuit l'intimée, compte tenu particulièrement des faits de la présente affaire, relève dans une large mesure des catégories de sujets attribuées exclusivement aux assemblées législatives des provinces. En réalité, ajoute-t-elle, alors que le par. 4(1) traite de certaines questions qui relèvent de la compétence fédérale, comme les immersions et la pollution extraprovinciales qui sont nettement du domaine fédéral, il englobe aussi, indirectement, des questions comme les déversements intraprovinciaux de substances et la pollution intraprovinciale. Il empiète donc sur les chefs suivants de compétence législative provinciale: les terres publiques provinciales (par. 92(5)), les ouvrages et entreprises d'une nature locale (par. 92(10)), la propriété et les droits civils (par. 92(13)) et les matières d'une nature locale ou privée (par. 92(16)).

Examinons d'abord la thèse portant que, ce que l'on cherche à réglementer en l'espèce, c'est une activité qui se déroule entièrement à l'intérieur de la province, sur un bien-fonds appartenant à la province. Ne sont en cause que des ouvrages et des entreprises d'une nature locale et il n'existe aucune preuve que la substance qui fait l'objet de l'interdiction prévue au par. 4(1) est nocive de quelque manière ou a quelque effet au-delà des limites de la province. Il n'est pas difficile, à cet égard, de conclure qu'il s'agit d'une matière qui relève de la compétence législative provinciale, à moins que l'on ne puisse établir d'une manière ou d'une autre qu'elle relève du pouvoir générale du Parlement de légiférer pour la paix, l'ordre et le bon gouvernement du Canada.

Paix, ordre et bon gouvernement

Il y a plusieurs applications de la compétence en matière de paix, d'ordre et be bon gouvernement qui peuvent être pertinents relativement au contrôle de la pollution du milieu marin. L'une d'elles est son application aux situations d'urgence. Le Parlement fédéral a clairement le pouvoir de répondre à une situation d'urgence grave, sans égard pour le partage ordinaire des compétences législatives en vertu de la Constitution. La plus évidente manifestation de ce pouvoir apparaît en temps de guerre ou d'insurrection populaire, mais il a, ces dernières années, aussi été exercé en temps de paix pour justifier le contrôle d'une inflation effrénée; voir le *Renvoi: Loi anti-inflation*, précité. Cependant, même s'il ne peut y avoir de doute que le contrôle de la pollution du milieu marin pose un problème sérieux, nul n'a soutenu que ce type de pollution a pris des proportions alarmantes au point qu'il faille passer outre au partage ordinaire des compétences législatives prévu par la Constitution.

Il y a une seconde façon d'invoquer le pouvoir de légiférer pour la paix, l'ordre et le bon gouvernement en l'espèce; ce pourrait être dans le cadre du contrôle de la zone de mer située en dehors des limites des provinces. Le gouvernement fédéral peut non seulement réglementer la mer territoriale et les autres zones sur lesquelles le Canada exerce sa souveraineté, soit en vertu de sa compétence législative en matière de propriété publique, soit en vertu de la compétence générale en matière de paix, d'ordre et de bon gouvernement, que lui confère l'art. 91 (*Reference re Offshore Mineral Rights of British Columbia*, (1967) R.C.S. 792) ou encore l'art. 4 de la *Loi constitutionnelle de 1871*, 34 & 35 Vic., chap, 28 (R.-U.) Je ne doute pas qu'il puisse aussi, et c'est là un aspect de sa souveraineté internationale, exercer sa compétence législative pour contrôler la pollution au-delà de ses frontières; voir le *Renvoi relatif au plateau continental de Terre-neuve*, (1984) 1 R.C.S. 86.

Lorsqu'il légifère, en vertu de sa compétence générale, afin de contrôler la pollution dans des zones maritimes situées en dehors du ressort des provinces, le Parlement fédéral n'est pas limité à la réglementation des activités qui se déroulent dans ses zones. Il peut prendre des mesures pour empêcher certaines activités dans une province, comme l'immersion dans des eaux provinciales de substances polluant ou susceptibles de polluer la mer à l'extérieur de la province. D'ailleurs, l'exercice de cette compétence, me semble-t-il, ne se limite pas aux eaux côtières et intérieures, mais s'étend au contrôle des dépôts en eau douce ayant un effet polluant à l'extérieur d'une province. On peut se référer ici à l'arrêt *Interprovincial Co-operatives Ltd. c. La Reine*, (1976) 1 R.C.S. 477, où cette Cour à la majorité a confirmé que le Parlement fédéral a compétence législative exclusive pour connaître d'un problème résultant du déversement d'un polluant dans un cours d'eau d'une province, ayant eu des effets dommageables dans une autre province. Ce n'est là qu'une application de la théorie des dimensions nationales qui déclenche l'application de la clause en matière de paix, d'ordre et de bon gouvernement.

Il ne devrait pas être nécessaire de démontrer que l'eau suit des cycles hydrologiques et qu'un contrôle efficace de la pollution exige une réglementation de celle-ci à sa source. Cette source peut, en fait, ne pas se trouver dans les eaux mêmes. Il est significatif que la disposition de la *Loi sur les pêcheries*, dont la Cour, dans l'arrêt *Northwest Falling Contractors Ltd. c. La Reine*, précité, a reconnu la validité comme moyen de protéger les pêcheries, interdisait le déversement de substances nocives non seulement dans l'eau, mais aussi en quelque lieu où celles-ci pourraient pénétrer dans des eaux poissonneuses. Compte tenu de la façon dont certaines substances s'infiltrent dans le sol et du déversement des eaux de surface et souterraines dans les cours d'eau et finalement dans la mer, cela est susceptible de viser une aire fort large. En vérité, comme la pollution du milieu marin résulte, dans une large mesure, de la pollution atmosphérique plutôt que du déversement de substances dans les eaux, une réglementation similaire pourrait être édictée à l'égard des substances qui polluent l'air au point de causer des dommages à l'océan ou, de manière générale, à l'extérieur des provinces. (Pour une analyse de l'interaction des polluants atmosphériques et de l'océan, voir IMCO/FOA/UNESCO/WMO/WHO/IAEA/UN/UNEP Joint Group of Experts on the Scientific Aspects of Marine Pollution, Reports and Studies No. 15, *The Review of the Health of the Oceans* (UNESCO 1982), à la p. 3 (ci-après le "rapport des Nations unies"), notamment aux pp. 1 à 3 et 15; Great Lakes Science Advisory Board to the International Joint Commission, *1980 Annual Report: A Perspective on the problem of Hazardous Substances in the Great Lakes Basin Ecosystem* (1980), spécialement à la p. 22 (ci-après le "rapport de la Commission mixte internationale"); rapport de la Commission mixte internationale, annexe A & B, "Assessment of Airborne Contaminants in the Great Lakes Basin Ecosystem", spécialement au pp. 1, 9 et 95. J'ajouterais que l'exercice de ces pouvoirs se fait avec une souplesse administrative considérable. Ainsi, un contrôle administratif énorme est attribué aux autorité fédérales en vertu du pouvoir, conféré par le par. 33(4) de la *Loi sur les pêcheries*, de permettre exceptionnellement le déversement de certaines substances polluantes en des quantités spécifiées, dans certaines zones, sous réserve des conditions précises. Je ne vois pas pourquoi il ne serait pas possible de formuler des dispositions similaires pour contrôler la pollution du milieu marin.

Le pouvoir décrit ci-dessus peut être complété par des dispositions adoptées en vertu de la compétence en matière de droit criminel. Ainsi, des dispositions spécifiques interdisant le déversement de substances particulières pourraient être formulées de manière semblable aux prohibitions de la *Loi des aliments et drogues*, S.R.C. 1970, chap. F-27. L'exercice conjugé de sa compétence en matière de droit criminel et de son pouvoir de contrôler la pollution qui revêt des dimensions extraprovinciales, confère au Parlement fédéral une très grande latitude pour ce qui est de contrôler la pollution du milieu marin. Même s'il ne conviendrait guère que j'examine la validité des dispositions de la *Loi sur la lutte contre la pollution atmosphérique*, S.C. 1970-71-72, chap. 47, qui ont été maintenues dans *Re Canada Metal Co. and The Queen* (1982), 144 D.L.R. (3d) 124 (B.R. Man.), il reste que ces dispositions montrent que la combinaison de la compétence législative générale du Parlement fédéral et de sa compétence en matière de droit criminel pourrait bien permettre d'interdire la pollution des eaux intérieures comme celle des eaux territoriales et des eaux en haute mer.

En fait, j'estime que l'étendu potentielle du pouvoir du Parlement fédéral de contrôler la pollution, par l'exercice de sa compétence générale, est à ce point vaste que, même sans recourir à l'argument spécifique qu'avance l'appelante, le défi constitutionnel peut, en définitive, résider dans la mise au point de stratégies judiciaires visant à en limiter la portée. Il faut se rappeler que la clause en matière de paix, d'ordre et de bon gouvernement peut comporter non seulement des interdictions, comme en matière de droit criminel, mais également la réglementation. La réglementation visant à contrôler la pollution, qui, incidemment, ne représente qu'une partie du problème global plus large de la gestion de l'environnement, pourrait certes inclure non seulement des normes d'émission, mais aussi le contrôle des substances utilisées dans l'industrie manufacturière ainsi que des techniques de production en général dans la mesure où elles ont un effet sur la pollution. Il y a là des conséquences énormes pour l'équilibre fédéral-provincial prescrit par la Constitution. Le défi auquel font face les tribunaux consiste, comme par le passé, à accorder au Parlement fédéral suffisamment de latitude pour lui permettre de s'acquitter de son obligation de régler les problèmes nationaux et internationaux, tout en respectant le régime fédéral prévu par la Constitution.

Ces considérations soulignent l'importance de lier l'interdiction à l'objet recherché. Parfois on peut facilement déduire l'existence de ce lien comme, par exemple, dans le cas du déversement de substances liquides nocives dans les eaux côtières. Dans d'autres cas, comme dans celui du dépôt de matières solides nocives à l'intérieur des terres, des éléments de preuve concluants seront nécessaires. Ces idées ont été bien exposées par le juge Rand dans l'arrêt *Saumur v. City of Quebec*, (1953) 2 R.C.S. 299, à la p. 333:

> (TRADUCTION) Si l'on admet, comme dans le Renvoi sur les lois de l'Alberta, que la législation d'une province peut toucher à certains aspects de l'activité religieuse et de la liberté de parole, du moins cette législation doit-elle, comme dans tous les autres domaines, être suffisamment précise pour révéler son objet. Dans notre organization politique, comme dans les régimes

> fédéraux en général, c'est la condition sine qua non de toute législation, d'où qu'elle vienne. Les tribunaux doivent pouvoir, d'après ses termes et les circonstances qui l'entourent, rattacher un texte législatif à une matière relativement à laquelle la législature qui l'adopte a reçu le pouvoir de faire des lois. Ce principe fait partie de la nature même du fédéralisme; on pourrait autrement conférer une autorité en termes si larges et généraux qu'elle mettrait un terme au partage des compétences. Lorsque les termes d'une loi sont suffisamment précis et qu'il est relativement facile de l'interpréter comme ne s'appliquant qu'à une matière entrant dans la compétence du législateur qui l'adopte, on procédera à cette affectation; et, lorsqu'on constate la présence des éléments requis, il existe la règle relative à la divisibilité. Mais il n'est pas possible de faire entrer dans l'un ou l'autre de ces mécanismes le fait d'autoriser un acte qui peut se rattacher indifféremment à un certain nombre de matières incompatibles au moyen de l'artifice d'un permis accordé de façon discrétionnaire. Les tribunaux ne peuvent alors, face aux termes généraux qui chevauchent des compétences exclusives, délimiter et préserver un pouvoir valide qui serait divisible. Si le but est la police des rues, l'imposition, l'enregistrement ou tout autre objet local, les termes doivent décrire avec une précision suffisante la matière du règlement et son mode d'application et il n'est pas possible, par aucun moyen laissant de côté cette exigence, de contourner les contraintes de notre droit constitutionnel.

Quelque large que soit l'interprétation que l'on donne au pouvoir fédéral de contrôler la pollution du milieu marin, conformément à l'analyse qui précède, elle ne saurait servir à justifier la disposition contestée en l'espèce, qui, comme dans l'affaire *Fowler*, précitée, est une interdiction générale de déverser quelque substance que ce soit dans les eaux, peu importe sa nature ou sa quantité, et qui de plus en est une où, pour reprendre les termes du juge Martland, à la p. 226 de cet arrêt, on "ne cherche pas à établir un lien entre la conduite prohibée et les dommages, réels ou probables", que ce que l'on cherche à protéger pourrait subir, savoir dans l'affaire *Fowler*, les pêcheries, et en l'espèce, l'océan. Comme dans l'affaire *Fowler* aussi, il n'existe aucune preuve démontrant que l'ensemble des activités visées par la disposition cause le dommage que l'on veut prévenir. Que l'on perçoive cela comme visant à protéger la propriété maritime fédérale, ou comme une tentative d'appliquer la théorie des dimensions nationales à une matière quelque peu semblable à celle dont il est question dans l'affaire *interprovincial Co-operatives*, précitée, la seconde thèse énoncée par lord Tomlin dans l'arrêt *Attorney-General for Canada v. Attorney-General for British Columbia* (l'affaire des conserveries de poisson), (1930) A.C. 111, à la p. 118, est pertinente ici. La voici:

> (TRADUCTION) (2) Le pouvoir général en plus du pouvoir de légiférer sur les sujets expressément énumérés, doit se restreindre strictement aux matières qui sont incontestablement d'importance ou d'intérêt national et ne doit empiéter sur aucun des sujets énumérés à l'art. 92 comme étant du ressort exclusif des législatures provinciales, à moins que ces matières prennent des proportions telles qu'elles affectent le corps politique du Dominion: voir *Attorney-General for Ontario v. Attorney-General for the Dominion*, (1896) A.C. 348.

(Cité par le juge Martland dans l'arrêt *Fowler*, précité, à la p. 220). En l'espèce, le Parlement peut sans aucun doute interdire les immersions de toute nature dans les eaux fédérales, mais à moins de trouver une théorie plus globale permettant d'appliquer celle des dimensions nationales, les interdictions d'immerger des substances dans les eaux provinciales doivent être liées à une compétence fédérale quelconque.

Pour ce qui est de savoir pourquoi le Parlement aurait dû choisir d'édicter une interdiction dans des termes aussi larges, on ne peut que formuler des hypothèses. Il se peut que, compte tenu du manque de connaissances sur les effets des diverses substances déposées dans l'eau, il soit nécessaire de surveiller tous ces déversements. Nous n'avons été saisis d'aucune preuve concernant la mesure dans laquelle il serait nécessaire de surveiller tous les déversements dans la mer pour mettre au point un régime efficace de prévention de la pollution du milieu marin. Un système de surveillance dont dépendrait nécessairement l'efficacité d'un régime législatif de contrôle de la pollution du milieu marin pourrait être justifié du point de vue constitutionnel. Mais, en l'espèce, non seulement aucune pièce n'a été soumise pour établir la nécessité d'un tel système, mais encore la Loi va beaucoup plus loin en interdisant le déversement de toute substance dans la mer, y compris dans les eaux intérieures des provinces. Si une telle disposition était jugée valide, pourquoi une disposition fédérale interdisant l'émission dans l'atmosphère de toute substance, quelle qu'en soit la quantité, à l'exception de ce qui est permis par les autorités fédérales, ne serait-elle pas justifiable du point de vue constitutionnel à titre de mesure de contrôle de la pollution du milieu marin, puisque nous savons maintenant que les dépôts d'origine atmosphérique constituent une source importante de pollution des océans? Voir rapport des Nations unies, à la p. 15; rapport de la Commission mixte internationale, à la p. 22. Ici encore, un extrait des motifs de lord Tomlin dans *l'affaire des conserveries de poisson*, précitée, aux pp. 121 et 122, cité aussi par le juge Martland dans l'arrêt *Fowler* précité, aux pp. 224 et 225, mérite d'être reproduit. Le voici;

> (TRADUCTION) Il se peut que leurs Seigneuries ne se prononcent pas sur cette question, que pour être efficace, une loi sur les pêcheries doive donner au Ministre les pouvoirs nécessaires pour faire observer les règlements interdisant, la prise de poissons non comestibles ou la pèche hors saison, pour inspecter toutes les conserveries ou les usines de traitement de poisson et exiger de ces établissements qu'ils fournissent des renseignements statistiques adéquats. Même si c'était le cas, il ne s'ensuit pas qu'il faille appliquer à ces établissements un système de permis comme celui prévu dans les articles en cause. Il n'est pas évident qu'un système de permis est nécessairement accessoire à une législation efficace en matière de pêcheries, et ni en Cour suprême ni devant leurs Seigneuries, on n'a produit une preuve qui établisse le lien nécessaire entre les deux sujets. Par conséquent, de l'avis de leurs Seigneuries, la seconde prétention de l'appelant n'est pas bien fondée.

L'avocat de l'appelante n'a pas, bien entendu, formulé la question de la façon dont je l'ai jusqu'à maintenant analysée. Cependant, je l'ai examinée de cette façon pour montrer que, selon une façon plus traditionnelle d'aborder les questions sous-jacentes que celle qu'il propose, le Parlement jouit de pouvoirs fort étendus pour combattre la pollution du milieu marin, à l'intérieur comme à l'extérieur des limites de la province, mais que, même si l'on pousse à l'extrême cette méthode traditionnelle, la disposition contestée ne peut être justifiée du point de vue constitutionnel. Il est nécessaire de procéder par un raisonnement tout à fait différent pour trouver une justification constitutionnelle à la disposition, un raisonnement, me semble-t-il, qui soumettrait le fédéralisme canadien, tel qu'il a évolué au cours des ans, à une tension considérable. Ce qu'il soutient, nous l'avons vu, c'est que l'immersion de toute substance en mer à partir, apparemment, des côtés des provinces et de l'embouchure des cours d'eau provinciaux, relève exclusivement de la compétence législative du Parlement, à titre de question d'intérêt national ou de dimension nationale, bien que le lit de la mer fasse partie du territoire de la province et peu importe que la substance soit nocive ou potentiellement nocive.

Le juge Le Dain a, dans ses motifs, analysé les précédents relatifs à la conception de l'aspect "intérêt national ou dimension nationale" de la clause en matière de paix, d'ordre et de bon gouvernement, aussi je n'estime pas nécessaire de la reprendre en détail. Il suffit pour mes fins que je dise que, depuis les années 30, on y a particulièrement eu recours à l'occasion pour faire relever de la compétence fédérale un certain nombre de matières, comme la radiocommunication (In re *Regulation and Control of Radio Communication in Canada*, (1932) A.C. 304), l'aéronautique (*Johannesson v. Municipality of West St. Paul*, (1952) 1 R.C.S. 292), et la région de la Capitale nationale (*Munro v. National Capital Commission*, (1966) R.C.S. 663), qui revêtent nettement une importance nationale. Elles cadrent mal avec la compétence provinciale. Tant par leurs rouages que par leurs conséquences pratiques, elles revêtent des dimensions nationales avant tout. Un bon nombre de ces matières sont nouvelles et manifestement d'intérêt extraprovincial. Il est donc approprié de les rattacher à la compétence législative générale du Parlement fédéral. Elles s'apparentent souvent à des questions intimement liées à la compétence fédérale. La radiocommunication (qui se rattache au pouvoir de réglementer les entreprises interprovinciales) en est un exemple. La question vivement contestée du contrôle des stupéfiants (cf. *R. c. Hauser*, (1979) 1 R.C.S. 984, et *Schneider c. La Reine*, (1982) 2 R.C.S. 112, le juge en chef Laskin) est intimement liée au droit criminel et au commerce international.

La nécessité d'effectuer de telles qualifications à l'occasion saute aux yeux. Toutefois de cette fonction nécessaire, il n'y a qu'un pas, qu'on ne saurait franchir, dirais-je en toute déférence, pour en venir à considérer un certain nombre de sphères d'activités tout à fait distinctes, dont certaines, selon les valeurs constitutionnelles acceptées, relèvent de la capacité législative fédérale, et d'autres de la capacité législative provinciale, comme une seule matière indivisible et d'intérêt national, non visée par les chefs de compétence expressément attribués par la Constitution. En conceptualisant ainsi de vastes questions sociales, économiques et politiques, on peut vraiment inventer de nouveaux chefs de compétence fédérale en vertu de la théorie des dimensions nationales et ainsi, par voie de conséquence, les soustraire à la compétence provinciale ou, à tout le moins, réduire la liberté d'action des provinces. C'est là, selon moi, ce qui découle de ce qu'a affirmé mon collègue le juge Le Dain, alors professeur, dans son article intitulé "Sir Lyman Duff and the Constitution" (1974), 12 *Osgoode Hall* L.J. 261. Il écrit, à la p. 293:

> (TRADUCTION) Comme l'indique l'affaire Munro, la question qui se pose dans le cas de la compétence générale, lorsqu'on ne peut invoquer la notion d'urgence, est de décider ce qui doit être considéré comme une matière unique, indivisible, d'intérêt national, non visée par les chefs de compétence énumérés aux articles 91 et 92. Il est possible d'inventer de telles matières en désignant par de nouveaux noms d'anciens objectifs législatifs. On tend de plus en plus à rassembler toute une gamme d'objectifs législatifs sous une désignation unique globale. Le contrôle de l'inflation, la protection de l'environnement et la préservation de l'identité ou de l'indépendance nationales en sont des exemples.

Le professeur Le Dain s'est contenté ici d'exposer le problème; il n'a pas tenté de le résoudre. Il me semble, toutefois, que certains des exemples qu'il donne, notamment le contrôle de l'inflation et la protection de l'environnement, sont exhaustifs et que, s'ils étaient acceptés à titre de matière relevant de la compétence générale du Parlement, ils modifieraient radicalement le partage des compétences législatives au Canada. Tenter de les inclure dans la compétence générale du Parlement fédéral, c'est, me semble-t-il porter sur un autre plan la guerre déjà perdue sur le plan économique, dans les affaires relatives au "New Deal" canadien. Dans le *Renvoi: Loi anti-inflation*, précité, mon collègue le juge Beetz a appuyé entièrement cette conception des choses en affirmant que le contrôle de l'inflation ne peut légitimement être incorporé dans la clause en matière de paix, d'ordre et de bon gouvernement, en vertu de la théorie de la dimension nationale. (Il était, nous l'avons vu, dissident mais, sur cette question aussi, sont point de vue étaient partagé par la majorité des juges de la Cour). Il y démontre l'erreur qu'il y a à percevoir l'inflation comme une source unique de compétence fédérale, dans le passage suivant, aux pp. 457 et 458:

> À mon avis, la constitution de compagnies pour des objets autres que provinciaux, la réglementation et le contrôle de l'aéronautique et de la radiocommunication, l'aménagement, la conservation et l'embellissement de la région de la capitale nationale, sont des cas clairs de sujets distincts qui ne se rattachent à aucun des paragraphes de l'art. 92 et qui, de par leur nature, sont d'intérêt national.
>
> Je ne vois pas comment les arrêts qui en ont ainsi décidé peuvent être invoqués à l'appui du premier moyen. Ces arrêts ont eu pour effet d'ajouter par voie jurisprudentielle de nouvelles matières ou de nouvelles catégories de matières à la liste des pouvoirs fédéraux spécifiques. Cependant la jurisprudence n'en a ainsi décidé que dans des cas où la nouvelle matière n'était pas un agrégat mais présentait un degré d'unité qui la rendait indivisible, une identité qui la rendait distinct des matières provinciales et une consistance suffisante pour retenir les limites d'une forme. Il fallait aussi, avant de reconnaître à ces nouvelles matières le statut de matières de compétence fédérale, tenir compte de la mesure dans laquelle elles permettraient au Parlement de toucher à des matières de compétence provinciale: si un pouvoir fédéral désigné à l'art. 91 en termes généraux, tel que le pouvoir relatif aux échanges et au commerce, doit, selon la jurisprudence, être interprété de façon à ne pas embrasser et anéantir les pouvoirs provinciaux (arrêt Parsons) et détruire ainsi l'équilibre de la Constitution, les tribunaux doivent à plus forte raison se garder d'ajouter des pouvoirs de nature diffuse à la liste des pouvoirs fédéraux.
>
> "L'endiguement et la réduction de l'inflation" n'est pas acceptable comme nouvelle matière. C'est un agrégat de sujets divers dont certains représentent une partie importance de la compétence provinciale. C'est une matière totalement dépourvue de spécificité et dont le caractère envahissant ne connaît pas de limites; en faire l'objet d'une compétence fédérale rendrait illusoires la plupart des pouvoirs provinciaux.
>
> Il est bon de rappeler également que l'inflation est un phénomène fort ancien, datant de plusieurs milliers d'années, aussi ancien probablement que la monnaie elle-même. Les Pères de la Confédération en étaient bien conscients.

Ces propos du juge Beetz me semblent s'appliquer a fortiori au contrôle de l'environnement, un sujet qui s'apparente davantage au présent litige. Toutes les activités physiques ont un effet quelconque sur l'environnement. Les réactions législatives possibles à ces activités visent un nombre important de pouvoirs législatifs énumérées, fédéraux et provinciaux. Attribuer ce sujet général du contrôle de l'environnement au gouvernement fédéral en vertu de sa compétence générale aurait pour effet de dépouiller de son contenu la compétence législative provinciale. Comme je l'ai dit précédemment, la protection de l'environnement englobe naturellement beaucoup plus que la pollution de l'environnement qui constitue notre principal sujet de préoccupation en l'espèce. Pour tirer un exemple du présent contexte, il n'y a pas de doute que les résidus de bois polluent l'environnement dans certaines circonstances, mais la déforestation elle-même influe sur l'équilibre écologique et, en tant que telle, constitue un problème environnemental. Or la pollution de l'environnement est elle-même de nature exhaustive. C'est le sous-produit de tout ce que nous faisons. Dans les rapports qu'à l'être humain avec son environnement, les déchets sont une chose inévitable. Le problème n'est donc pas nouveau, bien que ce ne soit que récemment que la vaste quantité de capacité de l'atmosphère et de l'eau de les absorber et de les assimiler, à l'échelle planétaire. Il y a donc là un sujet de préoccupation et les gouvernements de tous paliers ont commencé à s'intéresser aux nombreuses activités qui causent la pollution. Au Canada, tant le gouvernement fédéral que ceux des provinces jouissent de pouvoirs étendus pour traiter ces problèmes. Les deux paliers de gouvernement ont adopté des programmes globaux et spécifiques de contrôle de la pollution et de protection de l'environnement. Certains problèmes de pollution de l'environnement intéressent plus directement le gouvernement fédéral, d'autres le gouvernement provincial. Mais beaucoup sont intimement liés et tous les paliers de gouvernement coopérant activement pour régler ces problèmes d'intérêt mutuel; pour un exemple de cela, voir l'étude sur les Grands Lacs dans le rapport de la Commission mixte internationale.

Faire relever la pollution environnementale exclusivement de la compétence du Parlement fédéral, ce serait, me semble-t-il, sacrifier les principes du fédéralisme enchâssés dans la Constitution. Comme le professeur William R. Lederman l'a indiqué dans son article intitulé "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 *R. du B. can.* 597, à la p. 610, la pollution de l'environnement (TRADUCTION) "n'est pas un sujet ou un thème limité, (c)'est un sujet ou un thème général dont les conséquences sur le plan législatif touchent quasiment à tout". Si, dit-il, elle (TRADUCTION) "devait être reconnue comme un nouveau chef de compétence fédérale en vertu de la compétence générale du Parlement, la compétence et l'autonomie proviciales seraient alors en voie de disparaître dans l'ensemble du domaine des entreprises, des industries et du commerce locaux, existant jusqu'à ce jour en vertu des chefs actuels de compétence provinciale". Et j'ajouterais aux matières législatives qui seraient considérablement dépouillées de leur contenu le contrôle des terres publiques et des institutions municipales. En vérité, comme je juge Beetz l'a affirmé dans le Renvoi: *Loi anti-inflation*, précité, à la p. 458, au sujet de la compétence revendiquée en matière d'inflation, il ne resterait pas grand-chose du partage des compétences si le Parlement avait compétence exclusive en la matière. Pour des opinions similaires portant que la protection contre la pollution de l'environnement ne saurait être rattachée à un seul chef de compétence législative, voir, P.W. Hogg, *Constitutional Law of Canada* (2nd ed. 1985), aux pp. 392 et 598; Gérard A. Beaudoin, "La protection de l'environnement et ses implications en droit constitutionnel" (1977), 23 McGill L.J. 207.

Il est vrai naturellement qu'on nous demande de créer non pas une compétence générale en matière de pollution de l'environnement, mais une compétence limitée à la pollution du milieu marin. Mais il me semble que les mêmes considérations s'appliquent. Je vais néanmoins tenter de la considérer en fonction des qualités ou attributs dont on dit qu'ils caractérisent les sujets qui ont été jugés comme relevant de la clause en matière de paix, d'ordre et de bon gouvernement, à titre de questions d'intérêt national. Un tel sujet, a-t-on dit, doit être caractérisé par une unicité, une particularité et une indivisibilité qui le distinguent clairement des questions d'intérêt provincial. À mon avis, la pollution du milieu marin ne satisfait pas à ce critère pour diverses raisons. Outre celles qui s'appliquent à la pollution environnementale de manière générale, les difficulté particulières suivantes peuvent être notées. En premier lieu, les eaux de la mer ne s'arrêtent pas entièrement à la côte; à de nombreux endroits, elles remontent les cours d'eau sur plusieurs milles. L'application de la Loi paraît limitée aux eaux situées au-delà de l'embouchure des cours d'eau (et elle empiète d'autant moins sur les compétences provinciales), mais cela n'est pas tout à fait clair, et même si elle est ainsi limitée, on ne sait pas clairement si cette distinction est fondée sur des motifs de commodité ou sur des impératifs constitutionnels. Cela mis à part, la ligne de démarcation des eaux salées et des eaux douces ne peut être tracée clairement; elle varie selon la profondeur, charge avec les saisons et se déplace constamment; voir le rapport des Nations unies, précité, à la p. 12. En tout état de cause, ce sont moins les eaux, douces ou salées, qui nous intéressent que leur pollution. Et contribuent à la pollution des eaux de la mer de vastes quantités d'effluents qui se déversent ou d'infiltrent partout dans les eaux douces (id., à la p. 13). Il y a un mélange constant des eaux; les eaux douces se déversent dans la mer et les eaux de la mer pénètrent profondément à l'intérieur des terres, à marée haute, pour revenir à la mer chargées des polluants absorbés pendant leur remontée à l'intérieur de ces terres. La pollution du millieu marin ne se limite pas non plus à la pollution émanant des substances déposées dans l'eau. À d'importants égards, la pollution de la mer résulte des émissions atmosphériques, transportées sur de nombreux milles avant de se déposer dans la mer; voir id., à la p. 15; rapport de la Commission mixte internationale, à la p. 22. Je ne puis donc concevoir la pollution du milieu marin comme un sujet suffisamment distinct qui pourrait justifier le genre de compétence législative recherché en l'espèce. C'est là une tentative d'instaurer un pouvoir fédéral de contrôler la pollution sur un territoire géographique mal délimité, lequel pouvoir ne pourrait être exercé qu'à l'égard d'une partie seulement des causes de cette pollution. Un tel pouvoir équivaut donc simplement à une compétence fédérale tronquée en matière de contrôle de la pollution, qui ne s'applique qu'en partie pour répondre à son objectif présumé nécessaire, à moins bien entendu que l'on en soit prêt à l'étendre à la pollution émanant des eaux douces et de l'atmosphère, alors que, pour les raison déjà fournies, une telle extension pourrait engloutir complètement la compétence provinciale, aucun lien n'étant nécessaire pour établir l'objectif fédéral.

Cela m'amène à un autre facteur pris en compte lorsqu'on dit qu'un sujet relève de la compétence générale du Parlement à titre de matière d'intérêt national: son effet sur la compétence législative provinciale. En l'espèce, il faut rappeler qu'en vertu de sa présumée application à l'intérieur de la province, la disposition interdit virtuellement à cette province de disposer à sa guise de certains de ses biens publics, sans le consentement du fédéral. Un grand nombre d'activités diverses, exercées le long de la côte ou dans la mer adjacente, comportent des déversements de substances dans la mer. En fait, lorsque des grandes villes, comme Vancouver, sont situées au bord de la mer, cela revêt une importance considérable relativement à toutes sortes de problèmes qui se posent en matière de loisirs et sur les plans industriel et municipal. En fait, les zones maritimes les plus polluées sont celles qui baignent les côtes; voir le rapport des Nations unies, aux pp. 3 et 4. Parmi les causes majeures de cet état de choses, il y a les divers genres de constructions qu'on y érige, comme les hôtels et les installations portuaires, l'exploitation des ressources minérales et les activités récréatives (id, à la p. 3). Ce sont là des sujets de préoccupation immédiate pour la province. Ils touchent nécessairement à des activités sur lesquelles les provinces ont exercé une certaine forme de compétence au cours des ans. Peu importe que la "nouveauté" du sujet soit ou nom un critère nécessaire pour inventer de nouveaux domaines de compétence en vertu de la clause en matière de paix, d'ordre et de bon gouvernement, il s'agit certainement là d'un facteur pertinent quand cela signifie qu'il faut enlever aux provinces des chefs de compétence qu'elles ont déjà exercés. Comme je l'ai mentionné, la pollution, y compris la pollution côtière, n'est pas un phénomène nouveau, pas plus que bien des activités qui en sont la cause.

Un autre facteur pertinent, dit-on, est l'effet sur les intérêts extraprovinciaux de l'omission d'une province de s'occuper efficacement de contrôler les aspects intraprovinciaux de la question. Il m'est quelque peu difficile d'en saisir toutes les conséquences mais, à première vue, nous avons ici affaire à une situation où, comme nous l'avons vu précédemment, le Parlement jouit de pouvoirs étendues pour remédier à des conditions qui entraînent la pollution du milieu marin partout où elles se présentent. La difficulté que pose la disposition contestée réside dans le fait qu'elle cherche à réagir des activités dont on ne peut démontrer qu'elles polluent ou qu'il est raisonnable de croire qu'elles peuvent polluer l'océan. L'interdiction s'applique à une substance inerte au sujet de laquelle il n'y a aucune preuve qu'elle se déplace ou qu'elle pollue. L'interdiction, en fait, s'appliquerait au déplacement d'un rocher d'un secteur appartenant à la province à un autre. Je ne saurais accepter que le Parlement fédéral jouisse d'une compétence législative aussi large sur des matières locales, ayant des conséquences locales sur un domaine appartenant à la province. L'interdiction constitue essentiellement une tentative inacceptable de contrôler des activités sur un domaine jugé provincial dans le *Renvoi relatif à la propriété du lit du détroit de Géorgie et des régions avoisinantes*, précité. Il se peut bien que le motif de l'adoption de la disposition soit la prévention de la pollution du milieu marin mais, comme le souligne le juge Beetz dans le *Renvoi: Loi anti-inflation*, précité, le Parlement ne peut faire cela en tentant de réglementer une industrie locale, quoiqu'il puisse, bien entendu, réglementer les activités d'une telle industrie qui relèvent de la compétence fédérale, que ces activités soient expressément visées par un chef de compétence précis comme la navigation, ou qu'elles touchent à des domaines d'intérêt fédéral, comme la santé, en vertu de la compétence en matière de droit criminel, ou causent de la pollution dans les zones maritimes qui sont du ressort fédéral. Mais ici la disposition va tout simplement trop loin. D'après ses propres termes, elle vise des activités, savoir le dépôt de substances inoffensives, dans des eaux provinciales, par des entreprise locales, sur des biens-fonds provinciaux, qui relèvent de la compétence législative exclusive de la province.

Enfin, on a soutenu que la disposition pourrait recevoir une interprétation attenuée de façon à s'appliquer aux eaux fédérales seulement, mais je ne pense que cela soit possible. On n'a qu'à jeter un coup d'oeil à la définition générale du terme "mer" aux par. 2(2) et (3) pour constater la vaste portée de la Loi. D'ailleurs, il est bien connu qu'un bon nombre de baies et d'autres étendues d'eau intérieures au Canada sont situées à l'intérieur des provinces. Une grande partie des eaux intérieures fédérales sont situées dans l'Arctique et ont été expressément envisagées par le gouvernement fédéral.

Dispositif

Je suis d'avis de rejeter le pourvoi avec dépens, et de répondre à la question constitutionnelle par l'affirmative.

NOVA SCOTIA PROVINCIAL COURT

R.v. ENHEAT INC.

COLE, Prov. Ct. J. Amherst, November 13, 1985

***Fisheries Act*, R.S.C. 1970, c.F-14, as amended - Accused pleaded guilty to a charge under section 33(2) - Depositing a deleterious substance into water frequented by fish - Sodium dichromate and sulphuric acid into Etter's Brook into the LaPlanche River.**

Sentencing - $1000.00 fine levied - Section 33(7) order made providing for a environmental control program.

A tank in the metal finishing room at the accused's premises leaked approximately 500 gallons of a solution consisting of sodium dichromate and sulphuric acid. This material was deposited into a floor sump which drained into the Town sewer system and ultimately was deposited into Etters Brook which flows into the LaPlanche River.

The accused pleaded guilty to a charge under section 33(2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended.

The Court levied a fine of $1000.00 and imposed an order under section 33(7) whereby the accused is required to take certain actions towards the implementation of an environmental control program at the Enheat facility. The order addresses spent and process chemicals, contaminated rinse water and monitoring/reporting requirements.

A.J. Morley for the Crown.
W. Spicer for the Accused.

COLE, Prov. Ct. J.

I understand that there is to be a change of plea in the matter The Crown versus Enheat Limited.

MR. MORLEY

Yes, Your Honour, I believe, Mr. Spicer can speak to that.

MR. SPICER

Your Honour, my name is Wylie Spicer and there will indeed be a change of plea. The company is going to plead guilty.

COLE, Prov. Ct. J.

I guess we can deal with sentencing this morning. We don't need a probation report on the company.

MR. MORLEY

No, I believe we can deal with sentencing this morning, Your Honour. By way of background information, Your Honour, the spill occurred on February 7th, 1985. What was spilled at the Enheat Plant was *five hundred gallons* approximately of a solution of sodium dichromate and sulfuric acid and the officials from the Department of the Environment later analyzed the substance that was spilled as being a heavy concentration of sodium dichromate. A bio-assay test, which is a test to determine if fish can live in the solution or diluted proportions thereof was conducted and it was found from an analysis that approximately half of the test fish died even in a solution of .22 of one percent of the effluents which was taken from the plant.

COLE, Prov. Ct. J.

Mixed with water, I take it?

MR. MORLEY

Yes, mixed with water. So the conclusion of the bioassay test in short is that it was a very toxic substance and the topography of the situation there is that the leak tank would spill into the floor, the floor would enter into a sump area which would go into the sewer, to go into Etter's Brook, and ultimately from Etter's Brook into the LaPlanche river and so on down the ecological chain, I suppose. I should also point out that negotiations have been underway with the accused in this matter, through its solicitor, and they have been co-operative to date, as Your Honour has seen, they have elected to change their plea which does spare the Crown from approximately, from what would have been a two day trial and a considerable number of witnesses. In discussion of this matter with my learned friend, it has been agreed between us, with Your Honour's consent, that they enter into an Order under Section 33(7) of the *Fisheries Act*. Section 33(7) permits Your Honour to grant an Order directing the accused to take certain actions, or not to do certain actions, which will prevent the commission of any further offence under Section 33(2).

COLE, Prov. Ct. J.

Is one of them blocking that sewer?

MR. MORLEY

Not directly, Your Honour, but there is an Order which I have prepared for Your Honour's perusal. I've gone over this with my learned friend and with Mr. Beswick, the engineer at the plant, and they are in agreement with it. I should point out as well that Mr. Percy and Ms. Suday are here today as officials for the Environment to answer question if Your Honour has specific questions concerning the Schedule which is attached to the Order. Basically, Your Honour, it's hoped that the accused by following the steps outlined in the Order will prevent a future spill but if, despite the precautions, a spill did occur that the spill would be contained in a closed area and not be a hazard to the environment. I should point out as well that the Company has carried out a number of the recommendations in the Schedule to date.

COLE, Prov. Ct. J.

What does the Act provide if there is a breach of these conditions?

MR. MORLEY

My first reaction would be to think that if there were a breach of the Order that it would be contempt on the part of the accused, if he breached...

COLE, Prov. Ct. J.

The Act provides for such an Order as part of the Sentence?

MR. MORLEY

Yes, Section 33(7) provides for the Order of this nature.

COLE, Prov. Ct. J.

But what provides for its enforcement?

MR. MORLEY

The enforcement, I assume, would have to be by way of contempt if it was breached and that would require further proof. For the large part, I believe, that this type of Order will involve goodwill on both sides. That they will report and the Department is confident that they will follow the provisions and as I stated out, they have taken steps to comply with some of the recommendations to date already.

COLE, Prov. Ct. J.

And is the Crown recommending any further penalties?

MR. MORLEY

Well, the Crown would also recommend a fine, Your Honour, in the area of One Thousand Dollars. I guess this is in keeping with the principles of sentencing. It's desirable for the public to be protected foremost and it's also desirable for rehabilitation and deterrence and I suppose, the deterrent aspect would be the fine but the more important aspect in this case is the rehabilitation of the plant facility to prevent future spills and the Crown would rather see the Company spend their money preventing a future spill than paying a penalty fine at this stage.

COLE, Prov. Ct. J.

I may be naive but I find it surprising in this day and age that any sewer in our Town is allowed to enter into an open brook, whether it's designed for rinse waters from a chemical plant or a plant which uses chemicals or what we normally think of as sewage, so it can go draining off into areas that are the habitat of fish and by times people.

MR. MORLEY

That is correct, Your Honour. There is no question that I suppose the whole sewage system of the Town could be improved. I guess that doesn't...

COLE, Prov. Ct. J.

At least that one outlet could be improved.

MR. MORLEY

Yes. In light of the change of plea, and also the prepared Order, Your Honour, which, I think, sets out most of the aspects of the matter, I don't believe there is any need for me to suggest anything further.

MR. SPICER

Thank you, Your Honour. I just want to make a couple of comments so that Your Honour is aware how this thing actually happened. The tank in question is lead lined, so that it doesn't, has lead lining, which doesn't react with acid. That lead lining has a seam and what happened was that somehow the seam, at some stage of the game, split allowing this solution to go through the seam to the stainless steel tank underneath it, underneath the lining, eventually eating through that and then out into the processing room and there on as Mr. Morley has explained, out into the water. I'm advised that there is no way of knowing in advance whether or not the well was going to split. So that it wasn't a question of them being able to know that that in fact did occur, would occur, or that it was reasonably probable that it would occur. It now having occurred the Company has, as my friend says, taken a number to steps to insure that it won't happen again and indeed has pretty well completed a containment system. That, along with the other items contained in the Order that was discussed actually between Mr. Beswick and the representatives of the Department of the Environment, we're hopeful to insure that it won't happen again. Thank you.

COLE, Prov. Ct. J.

The penalty to be imposed upon the Company on its plea of guilty will be as follows, there will be a fine of $1 000.00, no costs, due and payable within fourteen days of today's date, which will be the 27th, and the Company will be bound by the following Order, made pursuant to what section...?

MR. MORLEY

Section 33(7) of the Fisheries Act, Your Honour.

COLE, Prov. Ct. J.

...made pursuant to Section 33(7) of the *Nova Scotia Fisheries Act*, or the Federal Fisheries Act, excuse me, which is in the Order in any event.

1985

IN THE PROVINCIAL MAGISTRATE'S COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ENHEAT INC., a body corporate,
with registered office at Sackville,
New Brunswick and a place of business,
at Amherst, Nova Scotia.

ORDER

BEFORE HIS HONOUR, JUDGE DAVID E. COLE, BEING A JUDGE OF THE PROVINCIAL MAGISTRATE'S COURT OF NOVA SCOTIA;

UPON IT APPEARING that the Accused, Enheat Inc. has entered a guilty plea to a charge under Section 33(2) of the Fisheries Act, R.S.C. 1970, C.F. - 14, as amended;

AND UPON HEARING COUNSEL for the Crown, ANTHONY J. MORLEY, and Counsel for the Accused, WYLIE SPICER:

AND UPON IT APPEARING that it is desirable the accused, ENHEAT INC., take certain measures which will or are likely to prevent the commission of any further offence under Section 33(2) of the Fisheries Act;

IT IS THIS DAY ORDERED pursuant to Section 33(7) of the Fisheries Act, that Enheat Inc., take those actions set out in Schedule "A" attached hereto, which Schedule forms part of this Order within the periods of time stated in Schedule "A", in respect to the Amherst, N.S. premises of Enheat Inc. **AND WITHOUT LIMITING** the generality of the foregoing the accused shall adopt and follow the course of conduct required by Paragraphs 1 through 4 inclusive under the Section of Schedule "A" dealing with Spent Chemicals; 1 through 3 inclusive under the Section of Schedule "A" dealing with contaminated rinse waters and 1 through 2 inclusive, including all sub-paragraphs under the Section of Schedule "A" dealing with Monitoring and Reporting for Liquid Effluents.

DATED at Amherst, Nova Scotia' this 13 day of November, A.D., 1985.

DAVID E. COLE, MAGISTRATE
Being a Judge of the Provincial
Magistrate's Court of Nova Scotia

SCHEDULE "A"

An acceptable environmental control program at the Enheat facility should address spent and process chemicals, contaminated rinse water and monitoring/reporting requirements.

SPENT CHEMICALS

The company shall submit to the Environmental Protection Service (EPS) and the Nova Scotia Department of the Environment (NSDOE), within six months, a management strategy for handling spent chemicals, including preferred options for treatment and disposal. Specific points relative to this are:

1. An inventory of the quantity and types of waste being stored on site in drums or other containers shall be maintained. A current copy shall be submitted to NSDOE on a semi-annual basis.
2. Spent process solutions will not be discharged untreated to the sewer, therefore, all such solutions will be retained and treated in a secure facility.
3. Any residual discharges must be handled in a manner acceptable to EPS and NSDOE.
4. Spent process solutions not amenable to treatment and sludges generated as a result of treatment, if stored on site, will be stored in a containment area acceptable to EPS and NSDOE, and included in the inventory (refer to Item 1 above). A portion of Enheat's fabrication shop with steel roof and walls, concrete floor with curbing, (to be installed) is adequate. Area should be secured by locks.

PROCESS CHEMICALS

1. Provision shall be made for 110% (by volume) containment, within diked area, or liquids used in the process rooms.
2. Dedicated storage capability for containing the most corrosive chemical solution shall be available at all times. Enheat's chemical treatment tank (3000 gallons) is the primary container, the two immersion rinse tanks are the back up containers.
3. Pumping capacity, capable of emptying largest tank in 3 hours, including some backup, shall be available to allow timely transfer of chemicals from a leaking tank to a secure one.

CONTAMINATED RINSE WATERS

In order to minimize the volume of contaminated rinse water and in good faith attempt to meet by these actions the "Metal Finishing Liquid Guidelines", (ESP 1-WP-77-5) Enheat Inc. shall:

1. In conjunction with weekly analysis of rinse water and on same reporting form, the condition (soundness) of rinse tanks shall be noted.

2. Curbs or gutters shall be installed to allow containment and cleanup or minor spills due to overflows or splashing.

3. Enheat will install a float alarm in catch basin in containment area in each of two process rooms.

MONITORING AND REPORTING FOR LIQUID EFFLUENTS

1. The following monitoring/reporting procedures are to be adhered to each time a spent solution is wasted from the metal finishing area:-

   (a) Record solution wasted (e.g.) acid bath, anodizing solution, cadmium plating bath, etc.);

   (b) Record volume wasted;

   (c) Record treatment method employed, including method of transferring spent solution to treatment tank, treatment chemicals added and time allowed for treatment;

   (d) Record quality of liquid waste discharged to sewer. The following parameters are to be analysed for each event:

   volume
   pH
   total suspended solids
   cadmium
   chromium (total)
   copper
   lead
   zinc
   nickel

The preceding is to be recorded and the form signed, dated and forwarded to NSDOE within fourteen (14) days of the completion of the wasting of the spent solution.

For rinse water, one daily composite sample per week is to be analysed (for total chromium and pH); pH is to be measured and recorded daily. This information is to be forwarded to NSDOE within thirty (30) days.

2. The company shall prepare and submit for review by EPS and NSDOE, within three (3) months, a contingency plan outlining appropriate alerting/reporting procedures, contacts and required cleanup actions to be undertaken in the event of a spill of oil or hazardous materials.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. ENSO FOREST PRODUCTS LTD. AND WEST FRASER MILLS LTD.

IVERSON, Prov. Ct. J. Kitimat, February 17, 1986

***Fisheries Act*, R.S.C. 1970, c.F-14, as amended - Accused pleads guilty to charge under section 33(2), depositing a deleterious substance into water frequented by fish -Pulp and paper effluent into the Oxbow of the Kitimat River - Other counts laid under Provincial Waste Management Act.**

Sentencing - Occurrence was not deliberate - No long-term damage - $1,000 fine levied.

Both accused, Enso Forest Products Ltd. and West Fraser Mills Ltd. pleaded guilty to a charge under section 33(2) of the *Fisheries Act*, R.S.C. 1970, c.F-14 as amended, depositing a deleterious substance into water frequented by fish. The substance was pulp and paper effluent and the water was the Kitimat River.

In passing sentence, the Court held that once the accused were aware of the problem, they responded immediately. Further, the Court considered the fact that there was no long-term damage to the Kitimat River.

V. Frolick, for the Crown.
N.E. Dauglis, for the Accused.

IVERSON, Prov. Ct. J.

I'm grateful to both counsel for their excellent submissions with respect to the facts leading up to the offence and with respect to the law as it relates to matters involving pollution.

In passing sentence, the court is mindful of the demands and proper demands placed on such companies by the legislature so as to protect the environment. It's also aware and considers that in all cases of human endeavour that mishaps occur.

In this particular case, I was impressed by the responsibility of the owners of this enterprise over the years, including the accused as these responsibilities relate to the protection of the environment. The court's satisfied that the occurrence was not deliberate. In fact, it appears that the damage was done to this culvert when cleaning the north settling pond in December of '84. Once the accused were aware of the problem, they responded immediately. I'm satisfied there were no long-term damage to the Oxbow or to the Kitimat River. And as a result of this incident, the drain pipe from the north settling pond as well as the south settling pond, both pipes have been sealed off with cement so as to prevent a re-occurrence.

The court, therefore, imposes a fine in the amount of ten thousand dollars, in default distress.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. EPSILON BUILDING PRODUCTS LTD.

SHAW, Prov. Ct. J. North Vancouver, June 4, 1986

***Fisheries Act*, R.S.C. 1970, c.F-14, as amended - Accused found guilty of offence under section 33(2), depositing a deleterious substance into water frequented by fish - Resin into Lynn Creek - Defence of due diligence rejected by the Court - Fine of $3,000 levied.**

On July 30, 1985, the accused company was charged with an offence under section 33(2) of the *Fisheries Act*, depositing a deleterious substance into water frequented by fish.

A Provincial Ministry of the Environment official observed an employee of the accused dump a container of a milky white substance into a grate in the company's yard. Moments later the official observed the same mixture flowing from a discharge pipe into the Lynn Creek. A sample of the mixture was collected as it flowed from the pipe. The mixture was composed of the washings of a resin used by the accused in the making of stucco. The next day, rainbow trout were placed in the sample and the trout died.

Evidence was also led by the Crown demonstrating that 18 days prior to the laying of the information, employees of the accused were told by a water sewer superintendent that they shouldn't be dumping and that the sewer was not connected to the District of North Vancouver's sewer system.

Held, the Court found the accused guilty.

The Court held that the company had not exercised due diligence in ensuring that the dumping of the liquid did not occur. The defence's argument that the mixture would have become so diluted by percolation and by the creek water and thus not deleterious was rejected by the Court as a specious argument that had been laid to rest in the caselaw. In referring to the definitions of "deleterious substance" the Court in *R.* v. *MacMillan Bloedel (Alberni) Limited* 1979 4 W.W.R. 654 has held that "what is being defined is the sustance that is added to the water, rather than the water after the addition of the substance". (See also *R.* v. *Marbar Holdings Ltd.* (1984) B.C.D. Crim. Conv. 5490-11). A fine of $3,000 was levied against the company.

K. Gillett, for the Crown.
A. Petronio, for the Accused.

SHAW, Prov. Ct. J.

This company is charged with depositing "a deleterious substance in a place under conditions where such deleterious substance.... entered water frequented by fish" (being Lynn Creek) in North Vancouver on July 30, 1985, contrary to Section 33(2) of the *Fisheries Act* R.S.C. 1970, c.F-14.

I find the facts to be as follows. On July 30, 1985 a conservation officer with the Provincial Ministry of the Environment took up watch of the west bank of Lynn Creek. In his view across the Creek was a discharge pipe (then emitting nothing onto the east bank) and the adjacent industrial premises of Epsilon Building Products Ltd. Late in the afternoon he saw an employee of Epsilon, using a fork-lift, dump a container of a milky-white mixture into a grate in the company's yard. Within moments the fluid flowed from the discharge pipe. The officer was able to collect into a container a sample of this mixture as it flowed from the pipe.

Testing of this sample, undiluted, was conducted the next day at the Environmental Laboratory. Ten rainbow trout were placed in the sample: within 20 minutes all were dead. I am satisfied the mixture was a deleterious substance within the meaning of the *Fisheries Act*.

There is ample evidence before me to show that Lynn Creek is a waterway that is frequented by fish. Similarly, it is clear that any flow from the discharge pipe initially falls onto the rip-rap on the bank of the Creek and shortly makes its way into the waters of the Creek.

On July 12, 1985 (18 days before the date of the charge) a water sewer superintendent for the District of North Vancouver saw the very same series of events: the dumping of a milky mixture into the grate, the flow from the discharge pipe, and the consequent discoloration of the waters of Lynn Creek. The superintendent went to Epsilon's premises and told one of the two employees involved in the dumping that they shouldn't be doing that "because the Fisheries wouldn't like it" as that sewer was not connected to the District sewer system. This employee thereupon realized that what they were dumping was going into Lynn Creek and not into the District system. I find as a fact that on the same day he informed his supervisor of this. The same employee was present when the dumping of July 30th occurred. Furthermore, another employee was present on or about July 12th when a number of persons who said they were "concerned citizens" expressed their concerns about what was being dumped.

The mixture we are concerned with is composed of the washings of a resin used by Epsilon in the making of stucco. It is called RESYN 3456 and is manufactured by Nacan Products Ltd. of Toronto. There is nothing in the literature supplied by the manufacturer, or on the drum containers, to indicate that the resin is deleterious to fish.

It is submitted on behalf of Epsilon that this is a strict liability offence, the defence of due diligence is available and it has been met; *R. v. Sault Ste. Marie*, 1978 S.C.R. 1299, a decision of the Supreme Court of Canada. I cannot see, on the facts I have found, that the company has exercised due diligence in ensuring this sort of thing would not occur. On the contrary, the company continued to do nothing even after it was put on notice, through its employees and a supervisor, that it should take care of its dumping, via the sewer, into Lynn Creek.

Epsilon has had further tests made. A sample of sludge taken from an area immediately below the discharge pipe on October 9, 1985 was found, on dilution, not to be deleterious. A portion of the original sample was retested on March 5, 1986 and was found, on dilution, not to be deleterious. On March 14, 1986 a percolation test was made in the area of this pipe. It was estimated that from a discharge flow of two gallons per minute from the pipe, one gallon per minute was reaching the creek. The remainder would presumably enter the groundwater system and would reappear as surface water downstream and in a diluted state. This evidence was called to support the theory that when the discharge occurred on July 30, 1985, the mixture would have become so diluted by the percolation and by the very creek water that it would not have been deleterious to any fish that may have been there.

In my view, this is a specious argument that has long been laid to rest by the judgment of the British Columbia Court of Appeal in *R. v. MacMillan Bloedel (Alberni) Limited* 1979 4 W.W.R. 654. At p. 658 Seaton J.A., in referring to the definition of "deleterious substance", said,

> "What is being defined is the substance that is added to the water, rather than the water after the addition of the substance."

At p.658-9, he continued,

> "Had it been the intention of Parliament to prohibit the deposit of a substance in water so as to render that water deleterious to fish, that would have been easy to express. A different prohibition was decided upon. It is more strict. It seeks to exclude each part of the process of degradation. The thrust of the section is to prohibit certain things, called "deleterious substances", being put in the water. That is the plain meaning of the words used and is the meaning that I feel bound to apply."

The same argument was advanced in the case of *R. v. Marbar Holdings Ltd.* It was rejected at the County Court level, (1983) B.C.D. Crim. Conv. 5490-13, and again by the Court of Appeal, (1984) B.C.D. Crim. Conv. 5490-11, where the *MacMillan Bloedel (Alberni)* case (supra) was referred to.

For these reasons, I find Epsilon guilty of the charge.

BRITISH COLUMBIA COUNTY COURT

R. v. FMC OF CANADA LTD.

WALKER, Prov. Ct. Squamish, February 19, 1985

***Fisheries Act*, R.S.C. 1970, c.F-14, as amended - Accused pleaded guilty to one count under Chlor-Alkali Mercury Effluent Regulations, S.5 - Chemical plant released mercury into Howe Sound - Fine of $5,000.00 levied - Mitigating factors of cooperation and remorse regarded by Court.**

The accused pleaded guilty to one count of releasing mercury from its chemical plant into Howe Sound. Due to mechanical failure nine kilograms of mercury were released thereby exceeding the limit of .46 kilograms per day set under S.5 of the *Chlor-Alkali Mercury Effluent Regulations*, passed pursuant to sections 33 and 34 of the *Fisheries Act*; R.S.C 1970, c.F-14, as amended.

As the Crown made no submission as to whether the defendant could have or should have anticipated air locks in the pumping system, the Court could only conclude the discharge was accidental. Neither the local plant nor the corporation which owned it had previous convictions.

In assessing a fine the Court considered the financial circumstances of the defendant company, that is, those of the multi-national and not those of the local operation. Quickness of response was related to the question of remorse and was considered a mitigating factor by the Court. Reporting the mercury spill as soon as possible in no way lessened the environmental damage here, but the Court should consider whether the accused would likely have been apprehended had it not reported. No evidence was led as to any direct profit from the spill. The Court disregarded the plea of guilty in determining sentence. That plea was a separate consideration from the factors of cooperation and remorse. To "regard a Plea of Guilty as a mitigating circumstance in sentence would be correlative of penalizing someone for pleading Not Guilty ... such as a penalization would be improper."

Of a maximum of $50 000, the Court levied a fine of $5 000.00, taking note that the company had had no previous difficulties with respect to pollution and had had various costs in correcting the deficiencies and in preparing the studies.

Ann MacKenzie, for the Crown.
David H. Searle, Q.C. for the Accused.

WALKER, Prov. Ct. J.

The Defendant has pleaded guilty to a violation under Section 33(5) of the Fisheries Act. I do not feel it is necessary to outline at length the facts, there having been an agreed Statement of Facts. However, I will refer to those facts upon dealing with the various headings under consideration in the question of sentence.

Briefly, the Defendant, a company operating a chemical plant in Squamish, on September 13, 1984, released an amount of mercury which found its way into Howe Sound, and which exceeded considerably the limit set under Section 5 of the *Chlor-Alkali Mercury Effluent Regulations*, passed pursuant to Subsections 33 and 34 of the *Fisheries Act*. The Defendant reported the accident, which they determine was as a result of a mechanical failure, to the relevant authorities within a reasonable time.

The maximum penalty available under Section 33(5)b of the *Fisheries Act* is a fine of $50 000.00. Crown have asked for a fine of between $10 000.00 - $15 000.00. Defence has asked for a fine between $1 000.00 - $10 000.00.

It is clear from Counsel, and the authorities cited, that a specialized set of sentencing criteria has developed in environmental cases, the offender often being a corporation. While these criteria are based on the classic principles of sentencing: punishment, rehabilitation, deterrence, and protection of the public, the public welfare nature of the wrongs and the corporate nature of the offender have necessitated certain refinements.

The Crown has submitted that there are four factors:

1) nature of environment
2) extent of injury
3) offender
4) general

Defence Counsel has set fourth 11 factors which should be taken into account in determining sentence:

1) deterrence
2) environmental damage
3) criminality
4) previous convictions
5) size, wealth and nature of corporation
6) corporate standing in community
7) quickness of response
8) cooperation
9) profit from infractions
10) whether plea of guilty entered
11) remorse

I shall deal with the points in the order raised by Defence. The first and second principles enunciated by the Crown are covered by Defence's second and third factors. Crown's third heading would be covered by the Defence's factors four to eleven.

Defence Counsel has provided me with an extensive series of authorities which have been cross referenced to the above-cited factors.

1. The first sentencing factor applicable to all Defendants, personal and corporate, is that of deterrence: deterrence to oneself and deterrence to others. Defence Counsel has suggested that this is the prime factor. It has regularly been repeated in the authorities cited that in pollution cases the dangers have provincial, national and international ramifications. The regulatory statutes attempt to curtail sometimes irreparable harm. Courts must, through penalties, deter repetition of harmful acts. In cases involving

corporate defendants, Courts do not have the opportunity of depriving the violator of its liberty, placing it on probation, giving it counselling, putting it on a curfew, or requiring it to do hours of community work. The penalty and the approbation of the Courts may only be expressed through a financial penalty which usually does not significantly alter the welfare of any individuals responsible for the oversight. The Courts must thereby somehow protect the welfare of the public by assessing a fine which reflects all of the various other factors under consideration.

2. The question of environmental damage is clearly the most problematic and least certain of those dealt with under the various headings. The agreed Statement of Facts reveals that nine kilograms of mercury was released, considerably greater than the limit of .46 kilograms per day. Defence Counsel has fairly stated the proposition that we must concern ourselves with potential damage and not actual damage, in those instances where actual damage cannot be measured. Such is the situation here. We do not know with any precision how the environment will suffer from the sudden insertion of nine kilograms of mercury. I have examined the Reports entitled *Environmental Survey and Assessment in relation to 13th September Spill Incident, and Mercury Content of Dungeness Crab Tissue 1984* prepared by I.E.C. Beck Consultants Ltd. I have also examined the paper filed entitled *Environment Impacts.* The conclusion of the *Environmental Survey* report suggests that only a minor increase in mercury level existed in the upper layer of sediment, but that these findings were based on one sample only. Moreover, comparison studies of mercury levels were inconclusive due to different sampling locations. The report recommends further analysis upon receipt of additional information.

In the *Mercury Content of Dungeness Crab Tissue 1984* report we read that the concentration of mercury in 25 crabs collected during November 3rd and 4th was below the consumable guidelines, described as 0.5mg/g Hg. We are further advised that there was a slight inconsequential increase from 1983 to 1984. It has not been presented in this study how many similar spills it would take to put the crabs over the consumable level.

Notwithstanding the optimistic, albeit tentative nature of the reports, I regard the environmental impact of the spill in this case at bar as potentially great, and one to be deplored both by the company, and by society at large. The penalty, in my view, must reflect the hazards such a spill brings about.

3. Criminality of Corporation Conduct

Defence Counsel has submitted here that in cases where the violation has been accidental or innocent rather than wilful the Courts might mitigate penalty. This heading is dealt with by Stuart C.J. in *R. v. United Keno Hill Mines Ltd. (1980) 10 CELR p.43 at p.49*, a decision of the Territorial Court of the Yukon:

> "*Criminality of Conduct.* The severity of punishment should be directly related to the degree of criminality inherent in the manner of committing the offence. Accidents, innocent mistakes, and not reasonably foreseen events are less damnable than wilful surreptitous violations. If a corporation surreptitiously dumps toxic waste in wilful disregard of regulations, a harsh sanction is required. Similarly, if a

> corporation is aware of the environmental damage being caused by their operations and does nothing to rectify or abate the problem, the Court is justified in accrediting such corporate conduct with a high degree of criminality (see: *R. v. Whonnock Lumber Limited*, unreported B.C. Provincial Court, January 1971.)"

I am advised in the case at bar that the system failure causing the dumping of the mercury had never before happened and that it has since been rectified. What I do not know, is the likelihood of such a malfunction happening. One can only speculate whether or not the Defendant should have known that the described malfunction was likely to occur, having regard to the design of the system in place. Could engineers have anticipated airlocks in the pumping system? If such anticipation were likely, the negligence amounting to wanton neglect might be read into these facts. There has been no such submission made by the Crown, nor has any admission been made that the problem was one which could have been anticipated, and I can only conclude that the discharge was accidental, and that it was not something which the Defendant should realistically have contemplated.

4. Previous Convictions

The local plant has operated in Squamish since 1965 without any previous charges or convictions. I am advised that no convictions have been entered against the corporation which owns and operates the Squamish plant.

This fact must operate in favour of the Defendant, both locally and in its general corporate activities.

5. The Size, Wealth and Nature of the Corporation

The Defence conceded through its filed argument and list of authorities that this is a factor to be taken into consideration. The Crown have submitted that the Defendant is part of a multi-national corporation whose net sales in the second quarter of 1984 amount to $940 000 000.00. Defence has advised me that this mill is the only chemical plant operated by the Defendant, that the local plant manufactures 184 tonnes of chlorine per day, which in the chemical industry would be classed as small.

I believe that one must look at the company as a whole, and not at the local operation. Moreover, no figures have been given as to the profitability of the local plant. Counsel have not dealt extensively with this heading. However, in dealing with a financial penalty against an individual the Court usually considers his financial circumstances, which here would be the Defendant company, and not the local operation. I might say here that the size and wealth of the Defendant here would enable the Court to impose a heavy fine, without apparently hampering any of its operations. This is no small one-man operation which would be put out of business were a fine in the higher range given.

6. Corporate Standing in the Community

This heading is, in my view, an important one. A useful approach is that taken by Ayotte, Terr, Ct. J. in *R. v. Echo Bay Mines Ltd.*, 12 CELR, p.39 at p.40:

> "The attitude of the defendant corporation toward environmental issues generally, as expressed in actions, not words, is a factor which may be taken into account."

Defence Counsel has submitted that the standing or character of the Defendant Company in the community is excellent. I would have to take his word for this statement, unless I were prepared to take judicial note of the same, having regard to the fact that I have been a resident of Squamish since the chlorine plant was built. It might have been useful had Defence Counsel called a witness outside of the company to give character evidence. Defence Counsel has said that the Defendant Company has spent $4 600 000.00 in reducing mercury in effluents, the sum being $9 000 000.00 in today's dollars. In view of the fact that Defence Counsel's statement as to good character has remained unchallenged by the prosecutor, I accept it as correct, without having to take judicial notice of any facts which might be public knowledge outside of this sentencing hearing.

7. Quickness of Response

It is clear from the authorities that this is an important factor, especially when it relates to a mitigation of damage. In the case at bar it is agreed by Counsel that the mercury spill was reported to the Federal and Provincial authorities as soon as possible. While it is clear that this early reporting in no way lessened the damage to the environment, the harm being non-reversible once the mercury entered Howe Sound, I agree with Judge Pearce in *R. v. Canadian Industries* (1977) 8 CELR (Yukon Territory Magistrates Court) that the Court should consider whether the accused would likely have been apprehended had the reporting not taken place. Clearly this heading is closely related to the question of remorse. It would be difficult for a Court to ignore the fact that a person entered a police station, and told the police he had just committed a crime, which they would not otherwise learn about. Implicit in his conduct would be remorse.

I place some emphasis on this fact, and regard it as a mitigating factor.

8. Cooperation

Defence Counsel have cited authorities for the proposition that the Court may take into account cooperation by violators in rectifying problems which arise therefrom. The facts here indicate that the Defendant and its officers fully cooperated in all respects, which is clearly shown by the fact that they reported the mishap at an early time after the spill.

9. Where a Profit was Realized by the Infraction

The cited authorities hold that this is indeed a factor. This heading is dealt with extensively in *R. v. United Keno Hill Mines Ltd.* cited above. On page 51

Stuart, C.J. states that the amount of the profit should almost always establish the minimum fine.

The facts here demonstrate that the Defendant did not directly benefit from the spill: whatever benefit existed was not expending the subsequently required construction costs necessary to avoid a similar spill. The facts disclose that it was necessary to effect a recycling system to prevent a spilled contaminated solution from entering Howe Sound. This is indeed an indirect cost relative to future profits, the amount of which has not been disclosed. However, as to any direct profit for the mercury spill, no evidence has been given.

10. Whether a Plea of Guilty was Entered

I could note that a plea of guilty was entered by the Defendant on January 15, 1985, the date of the First Appearance. The Information was sworn November 30, 1984. There is a difference of opinion expressed in the authorities cited as to whether this is in fact a factor which should be taken into account.

In *R. v. Canadian National Railways*, Lunney, Provincial Court Judge took the fact of a Plea of Guilty, thus avoiding a prolonged trial, into account. In *R. v. Canadian Industries Limited*, cited above, Pearce, J. found that a Plea of Guilty was not a mitigating factor.

This point was dealt with in *R. v. Panarctic Oils Limited* (1983) NWRT, p. 143 at p. 150, a decision of Bourassa, T.C.J., of the Territorial Court:

> "With respect to corporate attitude: the defendant corporation has taken an active interest in defending the charge against it - that is to be expected, and no inference should be made from that. The fact that the defendant pleaded not guilty makes the situation no different than when dealing with a flesh-and-blood defendant. The corporate defendant is entitled to have a case proven against it; and in this instance it has been done and, as I say, nothing can be made of that."

I adopt this view. It is fundamental in our system of criminal justice that the Crown may be required to prove beyond a reasonable doubt criminal charges, and an accused is not to be penalized for requiring the Crown to perform this function. While one might consider the question of a Plea of Guilty as allied to the factor of cooperation and remorse in my view they are separate considerations. How an accused acts upon apprehension is to be distinguished by his inalienable right for a trial of an issue.

It therefore follows that to regard a Plea of Guilty as a mitigating circumstance in sentence would be the correlative of penalizing someone for pleading Not Guilty, and in my view such a penalization would be improper.

I therefore disregard the Plea of Guilty in my determination of sentence.

11. Remorse

> A number of the authorities cited by Defence have dealt with this final heading. They, in summary, stand for two basic propositions, firstly if the company has done everything within its power to prevent further infractions and secondly if the company, through its principal officers demonstrate a regret at the occurrence and a personal intention to avoid a repetition of the offences, these facts must work in favour of the accused. I have no doubt here that the local officials have demonstrated their remorse, that they have done what they regard as feasible to avoid further offences. I have been told by Counsel that the local manager and plant engineer are sorry about the spill and to demonstrate this they came to Court each day of the Hearing. I really don't know how the senior officers at head office feel about the problem, and am uncertain as to whether their appearance would show an even greater remorse. Perhaps it might have since the trip from the plant to Court is a mere five minute trip for the local officials.

In passing sentence I must consider the foregoing submissions and determine an appropriate penalty, not to exceed $50 000.00. I am left with a broad discretion. I should say that I find the cases of little assistance in dealing with the amount of fine, both because of the cost difference in penalty provisions and the differences in fact patterns throughout. One is not likely to encounter two cases the same in this area of law.

The fine must be such that it will require FMC and other companies to ensure that the discharge facilities are beyond reproach, nature cannot afford many mistakes. On the other hand, I find no fault in how the company dealt with the problem once it was discovered, and note that this is a company of good standing in the community which has had no previous difficulties with respect to pollution. I take note of the various costs involved in correcting the deficiencies and in preparing the studies. I am of the opinion that a fine at the lower end of the scale is warranted having regard to all of these matters, and impose a fine of $5 000.00.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. FRASER RIVER HARBOUR COMMISSION AND RICHMOND LANDFILL LTD.

CAMPBELL, Prov. Ct. J. Richmond, November 23, 1982

***Fisheries Act*, R.S.C. 1970, c.F-14, as amended - Accused pleaded guilty to five charges under section 33(2) - Depositing a deleterious substance into water frequented by fish - Landfill leachate into the Fraser River - Total of $25,000.00 in fines imposed on two counts on first information.**

Sentencing - $25,000.00 on three counts on the second information - Attitude of co-operation a mitigating factor.

Both of the accused pleaded guilty to five charges of violating S.33(2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, by depositing landfill leachate into the Fraser River. A total of $25,000.00 in fines was imposed on two counts on the first information, and $25,000.00 on three counts on the second information.

The Court held that the defendants had demonstrated an attitude of co-operation that went to mitigation of sentence; in particular the judge regarded as relevant the Commission's undertaking of various studies and their seeking of expert advice to reduce their pollution problem. Neither defendant had had a previous conviction under the *Fisheries Act*. The Court accepted the amounts suggested by the prosecutor as fines and these amounts were agreed to by the defendants.

D.R. Kier, for the Crown.
B.J. Pettenuzzo, for the Accused, Fraser River Harbour Commission.
C.P. Cassady, for the Accused, Richmond Landfill Ltd.

CAMPBELL, Prov. Ct. J.

I have two Informations in front of me pertaining to the alleged pollution of the Fraser River by three companies or firms or corporations, Fraser River Harbour Commission, Richmond Landfill Ltd. and the Corporation of the Township of Richmond.

Certain charges have been brought under Section 33, subsection (2) of the *Fisheries Act* and pleas of guilty have been entered by counsel for Fraser River Harbour Commission and Richmond Landfill Ltd. to some of these charges. The Corporation of the Township of Richmond is being dealt with separately and I understand it's being adjourned for trial later on.

The offences before the Court allege that the two named defendants which I'm concerned with, Fraser River Harbour Commission and Richmond Landfill Ltd., did unlawfully deposit a deleterious substance, namely landfill leachate, into waters frequented by fish, namely the Fraser River. The offences are alleged to have occurred between the 22nd day of February, 1981 and the 2nd day of April, 1981 and the pleas of guilty which have been entered pertain to five different days during that period. Under Section 33, subsection (6) of the *Fisheries Act* there can be a separate offence for each day of such deposit.

It appears that the defendants did, by a process of placing garbage on a landfill area in the Municipality of Richmond, created what is called "leachate", a substance which has been shown to be a deleterious substance.

No one can disagree that there is a need for environmental protection and a need to clean up or take remedial action when pollution has occurred and as pointed out by counsel, the Fraser River is one of the most important fisheries in the Province of B.C. and certainly of Canada.

When it comes to the matter of sentence the primary consideration is deterrence. Section 33, subsection (5) sets out the penalty, being a maximum of fifty thousand dollars for a first offence, a hundred thousand dollars for a second offence. The maximum fines of course should be reserved for worse cases involving recklessness or deliberation or that show a complete disregard of environmental regulations or where it is not a first offence.

I do not find the defendants in this case to come within any of those categories. On the contrary, I understand the defendants and particularly the Commission undertook various studies, requested engineering reports and sought the advice of experts in an effort to reduce their pollution problem. I further understand that as of today that problem has almost been solved if not certainly improved. Their attitude and cooperation certainly goes to mitigation of sentence. I've also been advised that neither defendant has any previous conviction under the *Fisheries Act*.

The prosecutor has suggested certain amounts to be considered as fines in this case. Both defendants have indicated they are prepared to accept such amounts and have even agreed as between themselves as to apportionment of such fines. Accordingly, I accept the suggested amounts for the purpose of imposing fines in this case. I see no need to impose any higher amounts for the purpose of deterrence so on Information 8881 I impose the following fines. On Count 2, Fraser River Harbour Commission, nine thousand five hundred dollars, Richmond Landfill, three thousand dollars. On Count 4, Fraser River Harbour Commission, nine thousand five hundred dollars, Richmond Landfill, three thousand dollars. In default of these fines I order distress as against both defendants. Total fines on information -- on that Information come to twenty-five thousand dollars.

The next Information, 8891, I impose the following fines. Count number one, Fraser River Harbour Commission, five thousand four hundred dollars, Richmond Landfill Ltd., three thousand dollars. Count 2, Fraser River Harbour Commission, five thousand three hundred dollars, Richmond Landfill Ltd., three thousand dollars. Count 6, Fraser Harbour Commission, five thousand three hundred dollars, Richmond Landfill Ltd., three thousand dollars. Total fines on that information come to twenty-five thousand dollars and again, I order distress in default of the fines being paid.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. GOODLAND DEVELOPMENTS LTD. et al.

NIMSICK, Prov. Ct. J.
PAGE, Prov. Ct. J.

Burnaby, November 27, 1986
December 5, 1986

***Fisheries Act, R.S.C. 1970, c.F-14*, as amended - Section 33(2), depositing a deleterious substance into waters frequented by fish - Silt, sand and clay into the Hockaday Creek - Section 31(1), unlawfully carrying on a work or undertaking resulting in the harmful alteration of a fish habitat - Goodland Developments found guilty on counts under section 33(2) and one count under section 31(1) - Fine of $35,000 levied - Proceedings stayed against Vosper and Wright - Two counts against Gabar Contracting, Barker and Cordoba dismissed.**

Goodland Developments Ltd., David Vosper and Kenneth Wright were charged with three counts each under section 33(2) and one count each under section 31(1) of the *Fisheries Act, R.S.C. 1970, c.F-14* as amended. The proceedings against David Vosper and Kenneth Wright were stayed. Gabar Contracting Limited, Glen Barker and Isidro Crodoba were charged with one count each under section 33(2) and one count each under section 31(1) of the *Fisheries Act*. Section 33(2) prohibits the deposit of deleterious substances into waters frequented by fish and section 31(1) prohibits the unlawful carrying on of a work or undertaking resulting in the harmful alteration, disruption or destruction of a fish habitat. The substances involved were silt, sand and clay and the water was the Hockaday Creek.

The charges arose out of the development of a 50-acre parcel of land by the owner of Goodland Developments Ltd. As part of its application for planning approval to the District of Coquitlam in 1982, Goodland Developments hired engineering consultants to complete designs for the earth moving phase, which was the first phase of the project. Geotechnical reports, completed by soil engineers indicated the kind of soil they were dealing with and the potential problems that might be encountered.

These reports formed part of the contract between the owner, Goodland Developments and the contractor, Gabar Contracting Limited.

Gabar Contracting commenced phase one of the contract in June 1985 which involved the moving of approximately five hundred and thirty thousand cubic metres of earth to fill in a lower area on the parcel of land. The work on phase one continued until November of 1985 when a slide occurred which brought debris, sand, silt and clay down from the scarp area, over an escarpment, through a settling pond, under a road and into the Hockaday Creek. Environment officials checked the substrate at Hockaday Creek and observed that the bottom of the creek was covered with silt, fine silt, and sand. Ministry of Environment officials had attended the site in September 1985 and noted a silty discharge from the tributary of the Hockaday Creek. Ministry of Environment engineers indicated that the settling ponds were not of adequate size nor had they been maintained.

Held, the Court found the accused Goodland Developments Limited guilty of the three counts under section 33(2) and one count under section 31(1) of the *Fisheries Act*. The counts against Gabar Contracting Limited, Glen Barker and Isidro Cordoba were dismissed.

The Court found that there was no doubt that the Hockaday Creek was a fish habitat and that the evidence revealed that the creek was severely damaged as a result of the work being carried on by the company. The Court considered deterence to be the primary consideration in sentencing. The fact that it was a small company was not considered a mitigating factor and Goodland Developments Ltd. were held responsible for the acts of its agents. The Court levied a fine of $35,000 against the company.

The Court considered due diligence to be the primary issue with respect to the charges against Gabar Contracting Ltd. It held that Goodland Developments and the engineer had knowledge of certain things that Gabar Contracting did not have. The engineer should have taken proper steps to instruct Gabar Contracting as to what had to be done to avoid the potential problems. The majority of the damage to the creek took place where the bank gave way by an act of God. Gabar Contracting, with respect to the section 33(2) charge, did all they could do to make sure that the problem did not arise.

Further, water running through the settling ponds could have deposited all of the silt and sand in the creek bottom that disrupted the fish habitat in the creek and as such the Crown failed to prove its case on the section 31(1) charge.

F. Gordon, for the Crown.
G. Edwards, for the Accused (Goodland Developments and Davis Vosper).
G. Culhane, for the Accused (Gabar Contracting Ltd., Glen Barker and Isidoro Cordoba).

NIMSICK, Prov. Ct. J. (November 27, 1986)

As is always the case with matters of this nature they do not come easy, they usually are very complicated, a lot of issues to be dealt with and a lot of problems to be considered.

The charges here are under section 33(2) of the *Fisheries Act*, that is that the defendants deposited or permitted the deposit of deleterious substance, to wit: silt, sand or clay, in a place, to wit: a creek commonly kown as Hockaday Creek under conditions where such deleterious substance entered water frequented by fish and count two, under section 31(1) of the *Fisheries Act*, that is the defendants did carry on work or undertakings that resulted in the harmful alteration, disruption or destruction of fish habitat.

I think it of some value to deal with some of the evidence at least because it becomes important to determine the time frame that we are dealing with here.

The first evidence I will deal with is that of Ms. Latimer. Ms. Latimer is with the habitat detection agency, a government agency. She has been there for a long time and she obviously has considerable expertise in the field. However, I get the feeling from what she said that she is probably overworked, I will not say underpaid because I do not know that, but she has a lot of things on her plate and it may very well be partly because of that this very unfortunate incident happened. On the other hand it may be that it would not have mattered what anybody did, the incident may have happened anyway. She said that through 1985 she dealt with a couple of firms of engineers, with the owners of this land as well as the District of Coquitlam, that there were two separate applications made, that the second application which came to her I gather in about mid-1985 indicated that a lot of her concerns were not dealt with and at that time and before I gather she requested that the drainage from this land go into a settling pond in the southeast corner of the site in order that tributary be kept clear.

There was a change in engineering firms as I have already mentioned and she asked the District of Coquitlam to forward the information to the new engineer and she got no response. She said she was very busy with other applications so did not monitor the matter closely.

She visited the site prior to the events of November the 1st on August 23rd, September the 10th and October 22nd. She apparently spoke to Mr. Barker in November and he was making inquiries as to whether or not there was some documentation, in fact it was November the 25th, and he was told that the documentation had gone to the engineers and that if that was not sufficient that he should get back to her.

Mr. Elliot was called in by Ms. Latimer in September, September the 10th, of 1985 and he was asked to monitor what was going on at the site. I was somewhat surprised that from her evidence she had never mentioned to Mr. Barker in her discussions with him her concerns and she had not questioned him as to why the settling ponds were in the area that they were rather than in the southeast corner as she had suggested.

In any event things were basically turned over to Mr. Elliot who then gave evidence and he said he got the information from Ms. Latimer but at that time he may not have been aware that she had recommended that the settling ponds go into the southeast corner of the property. When he arrived on the site on September the 16th he noted some soapy water discharging from the northeast corner near the Brooker property and he spoke to Mr. Cordoba at the time and discussed the problem and told him that the water quality was unacceptable and at that time Mr. Cordoba agreed to build another settlement pond near pond number one I gather and also to use hay bales as a form of filter.

He said he went back on the 17th and noted that pond number one needed to be cleared but he said nobody was there on that day. He then spoke to Mr. Barker on the phone and he repeated what he had apparently told Mr. Cordoba and issued a warning apparently as to the quality of the water and that he would be taking water samples at some time subsequent to that. Mr. Barker thanked him apparently and was appreciative of the call and he said on November 3rd he went back again, again noted silty water discharging at the same place out of pond number one and that there had been no change in that pond.

On November the 20th he attended at the site again and it was his opinion that nothing had changed. That, of course, was based on his observations. However, we have Mr. Barker's evidence to the effect that the pond was cleared through that period of time on a regular basis. He spoke to Mr. Brooker and Mr. Cordoba at that time and then he supplied us with the map which indicated the site and what took place on that site.

Mr. Cordoba had mentioned that he had tried the hay bales but he said the water did not clear through fast enough and that there was a backup. Apparently it did not work very well.

He went back on November 25th and based on the photographs taken at that time it appears that pond number one at least had been dredged and that then on November 28th he and Ms. Latimer walked the Hockaday to check for silt and he said at that time there was considerable silt in the water.

He described the area in some detail and they went as far as the tributary and followed it up through Brooker's to the Goodland site. It was very cold that day, minus sixteen degrees.

On December 3rd he then met Mr. Barker on the site and talked to him and then together they went up the road to the northwest corner of the site. There he was shown where the slide had taken place or at least the flood and he indicated the ditches that had been dug to look after the silty content and he noted there was high silt content in the ditches.

December 5th he and Ms. Latimer and Mr. Langer went back to the site and took the various water samples. The three taken from the tributary indicated — at least two from the tributary and one from Hockaday Creek indicated silty water and he then indicated where the Brooker property had been flooded although he was not aware of that except by hearsay I gather.

He went back on December 8th and he said that the ponds had not changed in his opinion, that there was no depth in them at all and he said the Hockaday was still silty.

He said on December 9th there was no change in the ponds.

On December 10th he took the photos which are photographs one and two and he noted some work was being done and then on December 18th he took a photo, number twenty-seven, noted that the bales had not been changed.

On January the 16th he went to the scene, took another three photos and they did the work in Hockaday Creek to determine whether or not it was fish bearing.

On January 20th he then went with Mr. Currie and they walked the site.

It was interesting to note from Mr. Elliot's evidence that he was not aware apparently at the beginning in any event that Ms. Latimer had recommended that the drainage ponds, the settling ponds, should be in the southeast corner and when he went to see and speak to Mr. Cordoba and Mr. Barker his whole concern was with the settlement ponds in the northeast corner of the property. He said he had not seen any of the correspondence that Ms. Latimer had had with the engineers and he said that some of the time at least the water was frozen. He said he did not know about the flood until November 28th when Mr. Brooker told him.

Now, Mr. Langer and Mr. Lee, Mr. Langer gave evidence, Mr. Lee's report was filed, there's no question on the evidence that Hockaday Creek is a fish bearing creek and that the material that went into that creek is deleterious material and that it is harmful to fish.

I will not deal with it in any detail but Mr. Coatta gave evidence regarding the rainfall in that area and we know based on the arguments made by counsel as to the amount and certainly on October 30th, 31st and November 1st, the day that the flood took place, there was a considerable amount of rain although during the year, during the rest of the months that are filed, there was one month where the amount was higher and that was in January but there had been a considerable amount of rain during that period of time.

Mr. Brooker I think was reasonably helpful in terms of the history of that area. He noted that this was not the first time a flood of that nature had taken place although it may not have come from the same area, that his property had been flooded once before some years earlier and that on November 1st there was silt and sand to the depth of eighteen inches as a result of the flood and that he was assisted by Mr. Barker and his crew to clear and clean up the mess that was there.

Mr. Fraser, who is the engineering technician with the District of Coquitlam and who was responsible for investigating erosion and drainage problems, had apparently been up and down that road a number of times and what surprised me about all of the evidence that was given here, including that of Mr. Fraser, and the end result was that the District of Coquitlam had never issued any permits or any kind of licence to these people to do work that was to be done and yet nothing was done about that and I find that just a little odd in terms of the whole scenario. He said that he checked some areas. It was his opinion that the east bank on Easthoy Creek was lowered considerably from the previous year. The problem we have here is that Mr. Barker, and I will refer to that at this point, says that he did not touch either bank of Easthoy Creek, which was the culprit in terms of the flood, and that it was just exactly the way it was when he first went up there. Now, is it possible that somebody else in the intervening period from the previous year to the time when Mr. Fraser saw it in November that somebody else had done some work on that bank. On the other hand it may be that Mr. Fraser is mistaken or it may have looked quite different based on the surrounding area and the surrounding terrain. In any event there seems to be some question there as to what really took place.

He apparently had requested Goodland to restore the bank but I am a little concerned about the timing. He was at Brooker's place on November the 1st and it was as a result of a discussion between he and Mr. Barker that Mr. Barker agreed to do this work that he did to open the tributary up again and to clear some of the sand and silt away from Mr. Brooker's property. Mr. Barker said that that was not done in any way to indicate liability on their part but simply to assist and that that is not unusual in flood situations for private contractors to be called in to do work of that nature. I think I can go so far as to take judicial notice of that.

Mr. Fraser did indicate that that area where Gabar was working was an old gravel pit and the property had been exposed for many years and that there had been problems in the past. He said there was a dramatic change from four o'clock that day when he went by. He saw no obvious problem at that time but about six o'clock I gather the flood took place. He said it had been raining very hard. He was somewhat concerned when he noted that the ditch in the southeast corner was overflowing at Pipeline Road and he apparently —when he sent the letter to Goodland regarding the east bank of Easthoy Creek he did not know about Gabar or Mr. Barker or Mr. Cordoba.

We get to Mr. Barker's evidence. Briefly, I will just mention that Mr. Currie, who is an expert, was called to discuss manners in which settling ponds should be properly set up and so on. I think the significant thing there is that an engineer, a civil engineer, at least is required and is the person who usually makes the kinds of decisions that are made in terms of the building of such things as settling ponds and so on.

Mr. Barker says that he has been in the construction business since he was seventeen and that he has been a superintendent since about age twenty-three, which he said was about eight years. He said that he had no special training in the business of building settling ponds or anything, just his general knowledge of construction. He said that he had received the bid documents from Mr. Bryson at least the initial documents, did a rough calculation and then in February of 1985 he received the final specifications and was asked to bid. He sent his bid in and he obtained a contract which was signed on June 7th, 1985.

The contract is probably significant for the things that are left out rather than for the things that are in it. The discussion regarding settlement ponds is very general. It does not specify anything. There were no plans and I gather from what Mr. Barker said that Mr. Bryson was on the property almost daily, that he was the man that was in charge and that he was the person that gave directions in terms as to what was to be done. He said he was not aware that the necessary approvals had not been obtained and I think he may have said that he did not know that until he arrived in court. He had not heard from anyone that the water was to be diverted to the southeast corner to settlement ponds there until he heard it in court. He said the only thing that was indicated to him that he needed to do when he arrived on the site was to build a settlement pond, which he did, and to extend the burns along Pipeline Road and he did that. He said it was very dry and all of the work on the upper part had been completed by the 15th of September and he said that the slopes were done on the instructions of the engineer and that they had gone in with their surveyor and set the stakes and he did the work from that point forward. He said they did not excavate at all along Easthoy Creek. He said that it was obvious that the ditch in which the creek ran had been man-made and he said that the east bank was about one metre lower than that of the west bank.

He said that there were three ponds actually. He said that there was a pond there when he arrived and he pointed it out on photographs, exhibit — whatever that exhibit number is, three I think, in any event photograph one and two and he said the water ran into that pond and then into the second pond which he built and then number two was the third pond and that was built later. He said there was no reference in the contract about hydro-seating or putting in culverts or anything of that nature and certainly the engineers did not give any instructions pertaining to that. He said it was not his responsibility to obtain the approvals and that he assumed that those approvals had been obtained either by the owner or the eningeer. He said after he had built the pond nobody told him that it was not adequate. He said that it was built based on what he was told to do. He said usually when a pond is constructed it includes plans and specifications.

Insofar as the instructions from Mr. Elliot were concerned he said they tried to do all that he wanted them to do, including the building of the third pond and the using of hay bales. He said he did not know anything about the southeast pond or the flooding in that area.

Insofar as the flood of November 1st he said he did not hear about it until November 2nd. When he arrived there he said Mr. Bryson and Mr. Fraser were there. They asked him to do the work, to clear the ditch and they did. He said that on November 4th he went up to the top and noted that the corner of the ditch on Easthoy Creek had broken away and that was where the flood had come from apparently.

It was his conversation with Mr. Elliot on December 3rd that indicated that the water apparently was to be put to the southeast corner. He said he had never been told that by anybody, certainly not the engineer or the owner. He said there were other people on the site doing work and some of that work interfered with what they were trying to do but he said, "We tried to keep everything under control". He said they cleared the ponds regularly and they trucked the material away on a regular basis and that took place after mid-September and he said it was sometimes every day and sometimes every second day.

On October 29th he became concerned because Mr. Bryson certainly did not give him any instructions regarding the cessation of work and the letter was filed as exhibit eleven indicating his concerns that the work could not be completed properly because the water content of the fill was too high and the compaction would not be proper. He said that they had not done any work on the top after September 15th but they were doing some work down below.

He said their relationship with Goodland ended on December 24th. He said they did return on the 6th of January at the request of Mr. Bryson to clear the ponds once more.

On cross examination he was asked whether or not he was aware of the Thurber report and he said yes, he was and he basically understood it. He said that the recommendation of thirty percent slopes was followed. He said erosion was possible even at that. He was not aware of any seepage from Easthoy Creek and he never saw any. Mind you he said that it was a very dry day. He said, "We did all that we were requested to do." He said no plans or specifications were ever supplied for the ponds. He said he thought the photos did not show everything as one would have expected but he said there was no question that they did the work that was needed. He said had they been asked to do other work the contract provided for that and he said they would have gone ahead to do it but they were never requested.

Now, with regard to the submissions made by counsel basically there is only one issue and that issue is whether or not the defendants used due diligence in doing the work they did and in so doing could they be held responsible or not doing that work with due diligence could they be held responsible for the problems that arose here.

The defendant says through its counsel that they built the ponds based on instructions received from Mr. Bryson, that they did it to the best of their ability in the circumstances, that they thought in all respects that those ponds were working and he said that all of the earth moving had been done under the supervision of the engineer. He pointed out his concerns in the letter of October 29th to the engineer to which he received no response but apparently had talked with Mr. Bryson. He said they responded quickly to every request made and he said they even went so far as to request assistance which was not forthcoming very quickly and a little bit after the fact.

Apparently the letter to the District of Coquitlam from Ms. Latimer set out all of the requirements but the contract did not.

The defendant says that the case of *Sault Ste. Marie* which sets out the basis upon which the defence of due diligence can be raised applies and he refers also to the case of *R. v. Byron Creek Collieries*.

The Crown agrees that the only issue here is the due diligence issue. She points out that the Thurber report was available and that that should have indicated to Mr. Barker and his company that they were going to have to be very careful about what took place here and in fact did take place and that he should have given more consideration to the Thurber report. She says that the Crown has made out its case, that the evidence is clear that these people did not use due diligence, that they were a little lax in dealing with the matter and did not see the obvious coming and they should have seen that.

A number of cases are referred to and those cases I think can be dealt with in this way. There is a reference to the case of *Kelly v. The Canadian Northern Railway*. That is a 1950 case, British Columbia Court of Appeal. It deals with a dam that broke and resulted in the plaintiff's land being flooded. At the time the trial judge said that the damage was caused by an act of God and therefore the defendant could not be found liable. On appeal that was reversed. They said that the dam was not adequately constructed and maintained and that therefore the defendant was liable to the plaintiff.

R. v. *Placer Developments* I think is distinguishable on its facts but in terms of what it says regarding due diligence the Court decided there that the defendant, who was the owner, and its employees had not used due diligence and should have realized that what they were doing might cause difficulty.

Similarly, with *R.* v. *Campbell River Lodge Limited*. That was a case where the owner was found guilty as was the contractor. What the Court said in that case is that he failed — he was negligent in failing to properly instruct his employee as to what work could be done in a river and in failing to set up a proper system of control. Well, there was no system of control set up at all in that case.

Similarly, the case of *R.* v. *Jackson Brothers Logging Company Limited*. It was a case dealing with the building of a forest road and the Court said there that due diligence was not made out since the accused's co-efficient approach, its overriding concern for speed and its reliance on the British Columbia forest service had blinded it to its duty to exercise care when constructing a road.

In the case of *R.* v. *Pioneer Timber Company* again there the defence was that it was an act of God and there was a deposit of clay and gravel and a heavy rain at the time. They decided that it did not apply because it was late in the spring season and they should have realized that there would be a runoff of water that might be heavy and that they should not have left the material work where they did.

Getting back to the Thurber report the question here is what was the responsibility of the defendants. The owners and the engineer had in their possession at least -- the knowledge at least of certain things that the defendant did not have and the Thurber report which was prepared was a report which should have been considered by the engineer and the engineer then should have taken proper steps in my opinion to instruct the defendant as to what had to be done to make sure that those problems that arose would not arise. There is a saying that one does not go to his dentist to have a will drawn and one does not go to his lawyer to have teeth extracted and similarly here the engineer is the person who is responsible in my opinion for giving proper instruction to the defendant who was simply there to do the bidding of the engineer and the owner.

Now, if it is obvious to the defendant that what he is doing is something which is either illegal or going to create problems then he must look to the issue of due diligence and that then raises that issue here.

As I said at the beginning the problem that I have with this case is that a lot of people became involved but unfortunately there was a breakdown in communication between the District of Coquitlam, who should have been concerned about what was going on, with Ms. Latimer, who was very busy at the time, with Mr. Elliot, who did not have all of the information on hand and was called in very late in the picture and the fact that neither Mr. Bryson or the owner were before the Court to give evidence as to what they may or may not have done in terms of instructing the defendant and the evidence is quite clear that the defendant did not ignore the complaints or suggestions that were made. He did not know about most of them. He was not told by anybody, certainly not Ms. Latimer, and certainly not Mr. Elliot. Mr. Elliot, of course, did not know what those instructions were until late in the matter as well.

What happened on the 1st of November was — well, it is hard to know what caused that problem because Mr. Barker says that they did not change or in any way deal with the east bank of Easthoy Creek and he said that he does not know why the breach was there. He could not tell whether the water was so high that it started to run over the top and as a result washed it away, he says that he cannot tell, or whether or not the bank just gave way but in any event it did and in my opinion that was an act of God which could not be foreseen by the defendant at the time that this took place and that is where the majority of the damage to the creek took place. There is no question that the filtration of the water through the ponds and the small amount that was running through there in September and early October and the amounts that were running there in November could have deposited all of that silt and sand in the creek bottom that changed and disrupted the fish habitat in Hockaday Creek and having said that it comes to mind that the Crown has failed to prove its case on count two and that I would dismiss count two.

In terms of count one it is my opinion based on the evidence that I have heard that Mr. Barker and Gabar Contracting did all that they could do to make sure that this problem did not arise. The continuation after November 1st was a series of difficulties that arose but it is hard to know just how much of that problem was caused by the disaster that took place on November the 1st and I keep harking back to that because it is — before that there was no — it was not a serious problem and by the time Mr. Elliot arrived the damage was done. By the time he asked Mr. Cordoba to put in the second pond the damage was done and it would have been very easy if the proper instructions had been given in the first place for Mr. Barker and Gabar to block off that culvert that carried that small runoff and to run it down to the southeat corner. The whole problem would have been resolved and so it appears that there were a series of errors made. Those errors terminated at the engineer in my opinion and based on the evidence I would make that finding and that the engineer did not follow up on his responsibility knowing what the requirements were that Ms. Latimer had set out in her letter by not passing that information on to Mr. Barker that the problem arose and in any event as I have already said based on what I have seen here it is pretty clear that most of the damage, if not all of it, was done as a result of the disaster that took place on November the 1st and it is my opinion, and applying the reasoning in the Byron Creek Collieries case, that that was not something that Mr. Barker or Gabar could foresee and having said that I would dismiss count one.

PAGE, Prov. Ct. J. (December 5, 1986)

I've had time to consider the submissions made by counsel. The plea by the company was to three counts under section 33(2) of the *Fisheries Act*, and one count under section 31(1) of the *Fisheries Act*. These charges arose out of the fact that the company was conducting development which basically resulted in damage in Hockaday Creek in the Municipality of Coquitlam. There is no doubt that the Hockaday Creek was a fish habitat, and there is no doubt based on the evidence I heard on sentencing proceedings that that creek was severely damaged as a result of the work being carried on by the company. Without going into the damage in detail, I am satisfied that the creek was extensively damaged and that its recovery will be long term if it ever does recover. I have taken time to consider the cases referred to me on the sentencing proceedings. The principles set out in those cases are very, very clear. In cases of this nature the primary consideration of the Court must be deterrence. Deterrence mainly of other people to keep fish habitats in the province clean and free from pollution.

The Defence Counsel has indicated to me that because of the fact that I am dealing here with a small company, a company which was not too blame-worthy because most of the damage resulted as a result of the contractor, that I should impose a minimum sentence. I do not agree with that proposition. It is abundantly clear that the company is responsible for the acts of its agents.

I have given the matter some consideration and I have concluded that fines will be imposed with respect to each count. On each count of depositing deleterious substance under Section 33(2) there will be a fine of ten thousand dollars. That will be with respect to each count. And on the final charge of harming the fish habitat there will be a fine of five thousand dollars. In default of those fines there will be distress.

I would like to thank both counsel for expediting matters and you have now allowed me to help the other court.

TERRITORIAL COURT OF YUKON

R. v. GONDER & SONS LTD.

McGIVERN, Terr. Ct. J. Whitehorse, September 8, 1986

***Fisheries Act*, R.S.C. 1970, c.F-14 as amended - Accused pleaded guilty to two counts under section 33(2) - Depositing a deleterious substance into water frequented by fish and one count under section 31(1), unlawfully carrying on a work resulting in the harmful alteration of a fish habitat - Sediment into Laberge Creek.**

Sentencing - Mitigating factor - Accused was first of many operators utilizing road - $1500. fine levied.

The accused pleaded guilty to two counts under section 33(2) of the *Fisheries Act*, R.S.C. 1970 c-F.14 as amended. The first count related to the deposit of sediment on the ice covering the Laberge Creek, under conditions where such deleterious substance may enter waters frequented by fish.

The second count charged that the accused deposited sediment in the waters of the Laberge Creek. The accused also pleaded guilty to one count under section 31(1) of the *Fisheries Act*, carrying on a work or undertaking resulting in the harmful alteration, disruption or destruction of fish habitat.

The Court held that the circumstances of the case called for a minimal fine. While the accused was the operator who incurred legal responsibility through its permit and otherwise, there were other people who utilized the winter road in question. Further infractions would likely result in a more substantial penalty. A fine of $1500. was levied against the accused.

Nancy Irving, for the Crown.
Robert G. Kilpatrick, for the Accused.

McGIVERN, Terr. Ct. J.

I am satisfied, on the basis of the submissions that have been made, that a fine of $1500 in this particular case is appropriate. I agree with the principles as set out and brought to my attention by Crown counsel. I am also satisfied that the fine imposed in this matter is, under the circumstances, a minimal fine, and should be, because of the peculiar circumstances of this case where, really, the first operator in incurs, through the permit and otherwise, some legal responsibility to carry out the environmental protection that government people are properly concerned about. Then, of course, as might well be expected, when there are more than one group of people or operators utilizing the road, communications break down, and eventually, it is this defendant who is ultimately called upon to bear the legal responsibility. That, in some ways, is unfortunate, because, obviously, there are other people who have utilized this particular winter road, and certainly, from a moral point of view, ought to be called upon to pay part of the cost of putting the road back at least into the shape, or putting the countryside, I should say, back into the shape it was before the road was utilized, constructed, and not properly dismantled for want of a better word. That, of course, is not something over which I have any control.

I presume that should anything of this nature occur again with regard to this defendant, that there is every likelihood that a much more substantial penalty would be and should be imposed. That is not a threat. That is simply an observation, that one has now had brought to its attention that infractions of the law of this nature must be dealt with, with some severity, must also realize that if one were to continue to behave in this fashion, then the only thing to deter them is to increase the penalty.

Hopefully, that will not be the case with this particular defendant.

TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

R. v. GULF CANADA CORPORATION

BOURASSA, Terr. Ct. J. Yellowknife, August 13, 1987

***Ocean Dumping Control Act*, S.C. 1974-75-76, C.55 as amended - Accused pleaded guilty to eight counts under section 4(1) and 13(1)(c) - Barite and cement into the Beaufort Sea.**

Sentencing - Mitigating factors - Accused voluntarily advised authorities of the incident - No harm to environment, though harm to process of environmental protection - Total fine of $180,000 levied.

The accused pleaded guilty to eight counts of dumping substances into the ocean contrary to sections 4(1) and 13(1)(c) of the *Ocean Dumping Control Act*, S.C. 1974-75-76, C.55 as amended. The charges arose following the voluntary disclosure by the accused of the dumping of drilling products comprised of excess barite and cement into the Beaufort Sea. While the accused had applied for approval to dump the wastes, the approval had been denied by Environment Canada on September 26, 1986. Irrespective of this denial, the accused continued to intermittently discharge approximately 876 tonnes of barite into the Beaufort Sea during the period of September 23-30, 1986. Approximately 276 tonnes of cement were also discharged on September 30, 1986.

On November 27, 1986 the accused voluntarily disclosed the fact that dumping had occurred on the specified days.

The Court held that a penalty should seek to encourage law abiding as a core value of any corporation. While there is no harm to the environment in this case, there is harm inflicted upon the process of environmental protection.

While the voluntary reporting of the incident and the fact that the accused pleaded guilty operate in mitigation of sentence, it is not without qualification. There was no indication that the accused had taken action to rectify or eliminate the factors that led to this contravention and there was no personal appearance in Court by the corporate executives involved.

The fine must be such as to encourage respect for the law and compliance with its requirements in the future. It must be cheaper to comply. The Court levied a fine of $15,000. each on counts one and two and $25,000. each on counts three through eight. (Counts three to eight involved dumping after the accused had been informed in writing that the Ocean Dumping permit would not be forthcoming).

Geoffrey M. Bickert, for the Crown.
John Z. Vertes, for the Accused.

BOURASSA, Terr. Ct. J.

I will not reiterate all the facts of the case at this time. They have been read into the record and, as well, filed by way of Agreed Statement which I will append to this my Judgment.

In addition to those facts, the Court has had the evidence of Peter K. Devenis, Senior Advisor, Environmental and Contingency Planning, called on behalf of the Defendant, who testified as to some additional circumstances surrounding this incident.

Notwithstanding these two sources, this Court is still left in the position of being unable to answer the fundamental question of how and why these offences occurred. The key to that evidence remains in the hands of the Defendant, in particular, F.E. Mitton, Drilling Manager, and apparently the decision maker throughout. That these events occurred at all is surprising in light of the presence of all the trappings of concern for environmental protection exhibited by the Defendant - waste management programs, environmental advisory group, "awareness" briefings, reporting structures and the like.

This Court cannot go beyond the Agreed Statement of Facts and the evidence before it and speculate as to why or how this incident occurred in its desire to complete its understanding; that is not the Court's function. Nevertheless, it is open for the Court to make inferences that flow reasonably and naturally from the facts before it and I have made some findings in that regard.

In my view, the contravention of the *Ocean Dumping Control Act* was a deliberate and informed one. I come to that conclusion for a number of reasons: Gulf Oil is well aware of its responsibilities under the *Ocean Dumping Control Act*. Indeed, in 1986 this Defendant applied for and received permits to dump on two separate occasions. I believe therefore, that the law's requirements would be a practical or operational one by those concerned with operations such as Mr. Mitton, the Drilling Manager.

Following a meeting on September 18, 1986, Mitton ordered the dumping at sea after considering some disposal alternatives. I note particularly that storage costs at $9,000; the original cost of the material of $200 - $250,000 was taken into account, and in that light, management positively decided that the 1,618 tons were to be dumped. Later, operational considerations were advanced to explain the conduct of the Defendant. In my view, the considerations distill to one matter: The Defendant had surplus materials and wanted to get rid of them conveniently and quickly.

Dumping at sea commenced on the 23rd of September, 1986, under circumstances where I believe the Defendant knew a permit was probably required. Without a shadow of a doubt, the Defendant's Drilling Manager knew on the 25th of September that such dumping, in the absence of a permit contemplated by the Act, was unlawful, yet he suffered the dumping to continue. In its application for a permit on September 25th, the Defendant has suggested a date by which dumping would commence on September 26th. In light of the fact that dumping had already been ongoing for three days, such a statement is cynical to say the least.

Finally, I note that on or following the 26th of September, the Defendant did nothing to respond to the refusal to issue a permit which was communicated on that date. The dumping continued until the 30th of September. It neither ordered a cessation of the activity, nor did it pursue the matter of obtaining a permit. The majority of the material was dumped during this period.

For these particular reasons I conclude that the decision to dump was informed and deliberate. In addition, I find that the acts of the Defendant represented by its employee Mitton are tainted with elements of, possibly deliberate, and certainly negligent, misstatement of fact.

The Defendant has pleaded, and is found guilty of eight counts of dumping substances into the ocean contrary to Sections 4(1) and 13(1)(c) of the Ocean Dumping Control Act. Given the materials dumped, the maximum penalty for each count is $50,000. There is provision pursuant to Section 14 to make an Order to Refrain, but no provision such as the Fisheries Act for this Court to make an Order to Take Action.

Undoubtedly, this legislation was enacted by the Dominion Parliament to exert control over the use of Canada's oceans as dumping grounds, and on a larger scale, to protect the ocean and coastal environment, and not incidentally, those that rely upon its bounty, from harm or degradation. This goal of environmental protection - novel and faddist in the 1960s, has now become a serious national and international concern. Its importance has been recognized nationally - by legislation such as this - and internationally. In Our Common Future, the World Commission on Environment and Development wrote:

> "In the middle of the Twentieth Century we saw our planet from space for the first time. Historians may eventually find that this vision had a greater impact on thought than did the Copernican Revolution of the Sixteenth Century, which upset the human self image by revealing that the earth was not the centre of the Universe. From space we see a small and fragile ball, dominated not by human activity and edifice, but by a pattern of clouds, oceans, greenery and soils. Humanity's inability to fit its doings into that pattern is changing planetary systems, fundamentally. Many such changes are accompanied by life threatening hazards. This new reality, from which there is no escape must be recognized - and managed."

In my view, the maximum penalty limit of $50,000, and up to $100,000 for other substances, indicates that Parliament is alive to the importance of the problem. This is further confirmed and reinforced by the provision for Orders to Refrain pursuant to Section 14, and by the provision for deeming separate offences where an offence continues for a period of time with the obvious consequence of multiplying penalties.

The issue of penalty has to be addressed in this context. It is my view that the Courts must be cautious and not circumvent or defeat the law and its intended effect by judicial nullification.

Environmental protection by statutory enactments have in the past found expression in a number of ways, but usually in the framework that is compatible with our philosophy of government and law, i.e. everything is permitted except that which is prohibited - such as the *Fisheries Act*, for example. This enactment allows, as it were, the discharge of any substances unless it finds its way into water frequented by fish and is deleterious. In such cases, the conduct of the Defendant and real or potential damage to the environment is assessed by the Court after the event and its lawfulness is determined. By way of contrast, the *Ocean Dumping Control Act* and the *Territorial Lands Act* prohibit any act or conduct in the field unless it is permitted by the authorities. Under this regime technicians, planners and bureaucrats attempt to impact future events by controlling and managing present conduct.

It is my view that acting in defiance of permit requirements is in many respects different than becoming embroiled in an oil spill as a result of the failure to exercise due diligence. Issues such as that of deliberately flouting the law, the basic need for respect of the law and the frustration of orderly development and plans for the future come to the fore. The harm to be wary of and to protect against is that to the process and system itself rather than the quality of water in a particular lake. In this case, there is no harm to the environment, but there is harm inflicted upon the process of environmental protection.

The *Ocean Dumping Control Act* sets out in some detail in its Schedules what matters are to be taken into account in issuing or refusing permits. This enactment represents a plan and method to manage and protect the public welfare now and tomorrow:

> "SCHEDULE III
>
> 2(9) In issuing a permit for dumping, consideration should be given whether an adequate scientific basis exists for assessing the consequences of such dumping, as outlined in this Schedule taking into account seasonal variations.
>
> 3(1) Possible effects on amenities (e.g. presence of floating or stranded material, turbidity, objectionable odour, discoloration and foaming).
>
> (2) Possible effects on marine life, fish and shellfish culture, fish stocks and fisheries, seaweed harvesting and culture.
>
> (3) Possible effects on other uses of the sea (e.g. impairment of water quality for industrial use, underwater corrosion of structures, interference with ship operations from floating substances, interference with fishing or navigation through deposit of waste or solid objects on the sea floor and protection of areas of special importance for scientific or conservation purposes).
>
> (4) The practical availability of alternative land based methods of treatment, disposal or elimination, or of treatment to render the matter less harmful for dumping at sea."

In refusing the belated request to dump, the Environmental Protection Service reflected this emphasis on long-term planning and considered options by stating in its Telex to the Defendant:

> "As outlined in a letter from G. Packman to M. Smith (Gulf) dated August 13, 1986, Environmental Protection has in place a process leading to a decision on selection of a common user dumpsite next year. In the interim we would like to avoid the indiscriminate disposal of wastes on an ad-hoc basis.
>
> This office places a high priority on evaluating options other than ocean disposal for waste management. It is our conclusion that Gulf has not explored its options thoroughly and that more options might have been available had a longer term planning approach been applied.
>
> (My emphasis.)

Another aspect of approach to dumping represented by the *Ocean Dumping Control Act* is that it allows for public notification through the Gazette and the corollary - public input. This is vital in this jurisdiction where a large proportion of the population still relies, in large measure, on an ocean or marine based economy.

In a narrow way, it is not the environment that is comprised in this kind of case. The plans, process, system and future are the victims of permit infractions. Legislative goals and objectives are undermined; disrespect for the law is engendered.

These considerations, in turn, direct us to a particular sentencing goal, which must be to uphold the law itself over and above other considerations.

In this regard I refer to the *Report of the Canadian Sentencing Commission* which states in Sentencing Reform - A Canadian Approach that "...the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions."

Ayotte, T.C.J. in *Echo Bay Mines Limited*, Unreported, Feb. 5, 1979, said much the same in dealing with a permit infraction:

> "While the question of deterrence, in the circumstances of most of the cases referred to, is spoken of in terms of deterrence in engaging in land use operations that may cause damage to the environment, that word has a broader and more basic meaning as well. And that is deterrence to acting contrary to the law itself."

A leading analysis of corporate management In Search of Excellence by Thomas Peters and Robert H. Waterman, Jr. refers to the need for corporations to be "fanatic centrists" when it comes to certain basic core values. The authors go on to describe the need for managers to delineate crucial boundaries, within the corporation, that outline morality and, "the attitudes about integrity and things that will and will not be compromised in pursuit of the dollar."

Any penalty should, as far as it can, seek to encourage law abiding as a core value.

For all intents and purposes, in this jurisdiction, the Ocean Dumping Control Act is applicable to a finite number of potential offenders - and by finite I mean probably less than 12. Generally speaking the class of potential defendants is small, limited to large multi-national oil companies and their subsidiaries operating in Canada's Arctic. It is in that context that I would have hoped that the relatively severe and high profile consequences of a previous disposition under this Act - that the Defendant must surely have been aware of - would have encouraged this Defendant and all its employees to comply with the law. General deterrence apparently was not achieved as a result of that disposition.

The Court recognizes that the Defendant is a large, wealthy multi-national corporation that has been involved extensively and successfully in Canada's Arctic over the past few years. That involvement has seen numerous benefits flow to the people within this jurisdiction by way of employment, spin-off industry and development, and profits flow to the Defendant. It is not a one way process. The Defendant is involved, not only in the Northwest Territories, but across North America and elsewhere in good works and various philanthropic activities. The Defendant is successful and profitable for its shareholders.

As indicated at the outset, why the Corporation acted in this manner, whether it is a systematic problem or one of personnel remains uncertain, however, to the Defendant's credit, reason ultimately prevailed. On the 27th of November, the Defendant came forward and advised the authorities of the incident. In addition, the Defendant has pleaded guilty. These two factors weigh heavily in favour of the Defendant and operate in mitigation of sentence - but not without qualification.

Stuart, T.C.J., in *R. vs United Keno Hill Mines Limited* (1980) 10 C.E.L.R., p. 43, referred to a guilty plea as indicating remorse. Such remorse and genuine contrition, he wrote, would be reflected in three elements.

1. Speed and efficiency of corporate action to rectify the problem. In this regard we have no indication from the Defendant that the factors that led to this contravention have been rectified or eliminated.

2. Voluntary reporting of violation - which is present in this case.

3. The personal appearance in Court of Corporate Executives. Mr. Mitton was the key agent here who made the decisions and who could shed some light on the unanswered questions. It appears on the facts before me that Mr. Devenis, as Senior Advisor, is very much junior to Mr. Mitton, Drilling Manager, and has little, if any, authority within the corporate structure. He is, as his title suggests, an advisor only.

On this matter Stuart, J. wrote:

> "Too often corporations appear solely by agents through their lawyers or through a lesser functionary of the company. This practice suggests the lack of significance the company accords the offence. If the Court is to properly assess the degree of sanctions required to effect the full rehabilitation of the offending corporation, the governing or guiding mind, and the person of senior executive officers should be present to give evidence."

I am referred to *R. vs Echo Bay Mines Limited*, dealt with on appeal by the Supreme Court of the Northwest Territories, and thereafter by the Court of Appeal of the Northwest Territories. In that case, one of the only ones to have been dealt with at the Appellate level, fines totalling $28,000 were ultimately reduced to a total of $4,000, on a maximum possible of $35,000. That case dealt with a permit violation, but in circumstances markedly different than that under consideration today. In that case, as in *R. vs Dow Chemical*, 1 C.E.L.R. (N.S.), p. 169, official action, negotiation and discussion was involved which may have induced the Defendants to conduct themselves in a certain way or left them asleep to their obligations. In any event, this case is distinguishable on its facts in that regard.

I echo the concern of Stuart, J., in *United Keno Hill Mines Limited*, among others, that fines alone will not mold law-abiding corporate behaviour. This concern is evident in The Law Reform Commission of Canada's Report Sentencing in Environmental Cases and by other students of the law. (See for example, *Re-Thinking Penalties for Corporate Offenders*, McGill Law Journal, March 1986.) *The Panarctic Oils Limited, (1983)* N.W.T.R., p. 149, experience seems to have had little, if any, effect on this Defendant which would seem to confirm Stuart, J. concern. Without the authority to make an Order to Take Action, in light of the reservations of the Northwest Territories Court of Appeal with respect to corporate probation, this Court is left with only one sentencing tool, however, and that is the fine. Whatever else is said, the fine must be such as to encourage respect for the law and compliance with its requirements in the future. It must be cheaper to comply. The fine must be such that it is meaningful to the Defendant; it must secure the Defendant's attention to its obligations, and if it also fixes some attention upon the Defendant, so much the better.

I confirm that I have, in addition to these specific points, considered the other various principles associated with sentencing in environmental cases as argued by Counsel.

I thank both Counsel for their effective representations, cogent arguments and submissions in this case.

For these reasons, the following penalties are imposed:

On Count N° 1, dumping on the 23rd of September, 1986, - $15,000;
On Count N° 2, dumping on the 24th of September, 1986, - $15,000;
On Count N° 3, dumping on the 25th of September, 1986, - $25,000;
On Count N° 4, dumping on the 26th of September, 1986, - $25,000;
On Count N° 5, dumping on the 27th of September, 1986, - $25,000;
On Count N° 6, dumping on the 28th of September, 1986, - $25,000;
On Count N° 7, dumping on the 29th of September, 1986, - $25,000;
On Count N° 8, dumping on the 30th of September, 1986, - $25,000;

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

and

GULF CANADA CORPORATION

AGREED STATEMENT OF FACTS

1. The defendant is a body corporate incorporated federally under the *Canada Business Corporations Act* and registered as an extra-territorial company under the *Companies Act* (N.W.T.). Either directly or through servants or agents, the defendant has carried on extensive oil and gas exploration and drilling in the Beaufort Sea.

2. The vessel "Molikpaq" is a mobile Arctic caisson drilling unit which was employed by the defendant for drilling purposes at its Amauligak I-65B wellsite in the Beaufort Sea during the period of March through August 1986. The vessel is 364 feet square, 95 feet in depth from keel to deck and has a gross tonnage of 42,317 and registered tonnage of 32,266. It is certified to accommodate 86 persons. The vessel is registered to Beaudril Limited of Calgary, Alberta, a subsidiary or affiliate of the defendant. The Molikpaq has no propulsion system, and is towed from site to site, and ballasted in place.

3. Following the completion of drilling activity in mid-August 1986 and the completion of extended flow testing on September 15, 1986, the defendant commenced shutdown activities at the Amauligak I-658 wellsite on September 19, 1986. These activities included, among others, equipment removal, clean-up, drilling core-removal and the deballasting of the Molikpaq. The defendant had expected to moth-ball the Molikpaq for 2-3 years, ostensibly due to world oil prices.

4. The defendant wished to dispose of some 889 (metric) tonnes of excess barite and 453 tonnes of excess cement stored in the Molikpaq. By application made under the *Ocean Dumping Control Act*, dated September 25, 1986, the defendant sought approval to dump these substances into the sea in the vicinity of the Amauligak I-65B wellsite. Annexed as *Appendix 1* is a copy of the application, cover letter and supporting rationale submitted by the defendant.

5. On September 26, 1986 the responsible government agency, the Environmental Protection branch of the Department of the Environment, refused to grant the permit and transmitted a telex to this effect to the defendant on that date. Annexed as *Appendix 2* is a copy of the telex, stating the reasons for refusal.

6. During the period of September 23-30 1986 inclusive, the defendant intermittently discharged approximately 876 tonnes of barite into the Beaufort Sea from the Molikpaq, both while the vessel was at or near the Amauligak I-65B wellsite and while it was under tow, by Beaudril Limited's icebreaker "Terry Fox", to Summer's Harbour near Booth Island, Northwest Territories.

7. Approximately 202 tonnes of "Permafrost" cement and 74 tonnes of oil well "G" cement were also discharged into the Beaufort Sea from the Molikpaq on September 30, 1986, while enroute to Summer's Harbour.

8. Disposal of the substances was effected by attaching hoses to the barite and cement storage tanks (called "P-tanks"), placing the hoses over the side of the Molikpaq, and allowing subsurface discharge of the material to take place. At times, excess barite which had accumulated on the Molikpaq's deck was shovelled through fairleads into the ocean.

9. Prior to November 27, 1986, the defendant did not advise any government agency, and in particular, did not advise the Environmental Protection branch that such disposal was taking place before making application for a permit, continued while the application was being considered, and proceeded without interruption after notification was given to the defendant that a permit had been refused.

10. On November 26, 1986 Peter Devenis, the defendant's Senior Advisor, Environmental and Contingency Planning, contacted various government agencies in Yellowknife to arrange a meeting for the following day.

11. On November 27, 1986 in Yellowknife, the defendant advised the relevant government authorities of the discharge. In attendance for the defendant were F.E. Mitton, Manager, Drilling Division for Gulf Canada Corporation, as well as Mr. Devenis. The defendant presented a document entitled "Molikpaq-Shutdown", which is annexed as *Appendix 3*, and a map showing the route taken by the vessel under tow, which map is annexed as *Appendix 4*.

12. In February 1987 the defendant's representative, specifically, the drilling superintendent for the Molikpaq, expressed the view that most of the barite material had been dumped into the Beaufort Sea while enroute to Summer's Harbour, rather than at the wellsite. The drilling superintendent pointed out that only a small quantity of barite was disposed of at the Amauligak wellsite because the primary concern at that time was to load cargo onto supply vessels. The manager of Beaudril Limited from that period indicated that another reason for not disposing of the cement and barite at the wellsite was the estimated added cost of remaining on-site, being some $250,000 per day.

13. Command of the vessel Molikpaq was in the hands of two alternate drilling superintendents during drilling activity, and in the hands of two alternate barge masters at other times, including while under tow.

14. Some days prior to commencement of the discharge, the defendant considered a number of disposal options. Mr. Mitton, manager of the drilling division discussed these with Mr. Felzien the manager of Beaudril Limited. Disposal options considered included:

   a) storage of the material in tanks possessed by Haliburton Limited situated on Dome Petroleum Ltd. premises in Tuktoyaktuk. Storage costs were estimated at roughly $100,000 per year;

   b) storage in Northern Transportation Company Limited ("N.T.C.L.") containers in Tuktoyaktuk. Cost estimates provided by N.T.C.L. were in the order of $9,000 per year;

c) loading the material onto a ship and transporting it to the Alaskan Beaufort Sea for use in a Shell Oil drilling operation there, however the drilling plans were not implemented, and in any event the cargo vessel available (the "Kulluk") had insufficient storage space;

d) discharge of the material into the Beaufort Sea.

15. The barite in question had been on board the Molikpaq since 1984 stored in bulk silos and was considered for the most part to be waste material, since it had started to lump and therefore may not have been reusable in future drilling operations and would have to be disposed of in some manner in the future. The original cost of the barite ultimately dumped was in the range of $200,000-$250,000.

16. As much as possible of the reusable barite and cement were offloaded from the Molikpaq by supply vessels and stored in P-tanks on a barge in Tuktoyaktuk harbour.

17. One of the concerns expressed by the defendant in its rationale for seeking approval to dump the substances was the critical time constraints and impending freeze up. The Molikpaq had to be towed to Summer's Harbour from the Amauligak I-65B wellsite prior to freeze-up. In fact, open water conditions remained along the Arctic coast to Summer's Harbour until October 13, 1986.

18. Storage of the material in the Molikpaq was not considered viable, because of the expected 2-3 year "mothballing" anticipated, during which time moisture could harden (the material) and possibly damage the Molikpaq's storage tanks.

19. On September 18, after Mr. Mitton, the defendant's Drilling Divison Manager, and Mr. Felzein, the manager of Beaudrill Limited (who, at that time reported directly to Mr. Mitton) had considered the various disposal options, Mr. Mitton gave approval to the discharge. Subsequent to the decision having been made, the discharge commenced on September 23, 1986, and Mr. Mitton was advised of it on that date. Two days later Mr. Mitton was made aware of the ocean dumping permit requirement, and the permit application signed by Mr. Mitton was telecopied to Environmental Protection.

20. Following refusal of the permit on September 26, 1986, Mr. Devenis, the defendant's Senior Environmental Officer, sent a telex to the Molikpaq passing on this information. No instruction to cease dumping was communicated to the Molikpaq.

21. It is agreed that there was no significant environmental impact from the discharge. In addition to the laboratory analysis of the barite in question annexed to the permit application contained at *Appendix 1*, the accuracy of which is accepted, it is agreed that the statements contained in the report of Russel G. Shearer, *Ocean Dumping Control Act* Inspector, at *Appendix* 5 are true and correct.

22. Annexed as *Appendix 7* and *Appendix 8* are copies of *Environmental Protection Annual Reports of Ocean Dumping Activities in 1985 and 1986* respectively.

NEWFOUNDLAND PROVINCIAL COURT

R. v. HALL'S REFRIGERATION LTD.

REID, Prov. Ct. J. St. John's, October 15, 1987

***Fisheries Act*, R.S.C. 1970, c.F-14, as amended, depositing a deleterious substance into water frequented by fish - Ammonia into Rennie's River - Defence of due diligence rejected - Custom did not necessarily mean that reasonable care had been exercised - Accused found guilty.**

The accused was charged with an offence under section 33(2) of the *Fisheries Act*, R.S.C. 1970, c.F-14 as amended, depositing a deleterious substance into water frequented by fish. The substance involved was ammonia and the water was Rennie's River near St. John's, Newfoundland.

The Crown relied on results from tests performed on samples of water obtained from the River near the outfall of a certain storm sewer. Department of Environment officials determined that there was ammonia in the water and observed countless dead fish in the same area.

The officials, taking samples from various spots, followed up the storm sewer system which led them to Fieldian Gardens. A defence witness volunteered that a discharge of water containing ammonia had been made at the Fieldian Gardens Arena site by the accused within a couple of days of the investigation. Employees of the accused company had been performing service work on the equipment at the Fieldian Arena.

The accused raised the defence of due diligence citing that the filtering of ammonia through a barrel of water was a procedure that was customarily used in the disposal of ammonia. The defence of necessity was also argued due to the urgency of the situation caused by a broken ammonia valve inside the arena.

Held, the Court found the accused guilty.

The Court rejected the due diligence defence on the grounds that the observance of custom did not necessarily mean that reasonable care had been exercised.

The Court held that while it was necessary to get the ammonia out of the building at the earliest possible time, when you are dealing with the defence of necessity and due diligence there is an obligation not to create further damage upon removing the immediate danger.

Draining the water for a period of 3 to 4 1/2 hours over the ground after getting it out of the building, without really checking to see where the water was going, was not exercising due diligence.

REID, Prov. Ct. J.

Hall's Refrigeration Limited. Now as you will recall the last day, the 10th of September, we heard the evidence from various witnesses on this matter. This matter was adjourned until today for judgement. The charge before the Court is that the defendant, Hall's Refrigeration Limited,

> did on or about the 20th day of August, 1986 at or near Fieldian Gardens Arena on Penneywell Road, St. John's, the province of Newfoundland unlawfully deposit a deleterious substance, namely ammonia in waters frequented by fish, namely Rennies River, St. John's, contrary to Section 33(2) of the *Fisheries Act*, R.S.C., 1970, c.F-14 as amended, thereby committing an offence punishable under Section 33(5)(b) of the said *Act*.

Now looking at Section 33 of the Fisheries Act defined in Section 33(2) that the following subject of sub-section 4 says

> no person shall deposit or prevent the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter into such in a waterway.

Under sub-section 5 of the same section, b says

> subject to sub-section 2 anyone who commits an offence under this section is guilty of an offence and liable on summary conviction to a fine not exceeding $50,000 for a first offence and not exceeding $100,000 for each subsequent offence.

Now the deleterious substance in question in this case is the substance known as ammonia. I don't believe there was any dispute on the last date that ammonia is a deleterious substance within the meaning of the *Act* and, therefore, I don't feel any need to deal further with that as an issue. Since there is no dispute on that matter and as well, I believe, there is no dispute that Rennies River is located in St. John's and that Rennies River constitutes waters frequented by fish is also... by the *Act*. I don't need to deal any further with that matter.

In fact, in my view, the outcome of this case rests on the answers to four basic questions as I see it. Those four questions are quite simply, number one, what is the prohibited act; was the prohibited act, in fact, committed; did the defendant, in this case, Hall's Refrigeration Limited commit the prohibited act. Once those questions are answered — those three questions are answered if they are answered in the affirmative, it seems to me then since this is a case, in my view, of strict liability, has that characterization set out by Mr. Justice Dickson of the Supreme Court of Canada in *R. v. Sault Sainte Marie*. The fourth question basically is whether the accused or the defendant, Hall's Refrigeration Limited, can be said to have taken all reasonable steps to avoid the prohibited act that we are talking about. The burden, of course, if we get to that question, the burden of establishing that reasonable steps, the defence of due diligence in other words, were taken to avoid the act rests with the defendant. I believe that I am right in saying that in dealing with the general principles of the law as evidence, general trial laws, that it is up to the defendant to establish on a recognizance of evidence that he did, in fact, take reasonable steps to exercise due diligence in trying to avoid the prohibited act. Having said that then, I am going to deal with the four questions as I set them out, as I framed them, and to consider each of those questions in turn in relation to the evidence that has been adduced.

The first question then is what is the prohibited act? Well it seems to me by reference to Section 33 of the *Act* the prohibited act is very clear that

> no person shall deposit a deleterious substance in waterways frequented by fish or deposit a substance found in a place where that substance may, in fact, end up in a waterway.

That is the prohibited act we are talking about in this case.

The second question is whether the prohibited act was committed. The evidence with respect to that question again to me seems quite clear. The investigators from the Environment Department went down to Rennies River at the outfall of a certain storm sewer system and took samples of the water, tested the water, and found there was ammonia in the water. They also found coutless numbers of fish in the waters in the same area that died from having been in contact with ammonia. At the same time or in relation to the same event, the investigators also followed up the storm sewer system and took samples at various spots which finally led them up to the storm sewer drain at Fieldian Gardens and found the presence of ammonia in the storm drain system right up to Fieldian Gardens where a discharge of ammonia, water containing ammonia, had been made within a couple of days of the investigation. So I don't think that there is any question; certainly there is no question in my mind that the prohibited act was committed. I am satisfied beyond any reasonable doubt that the act was committed.

The third question was it committed by this defendant. Again I'm satisfied on the evidence, the evidence that has been adduced by all of the witnesses including Mr. Gregory Hall and, of course, the statement of Mr. Ronald Hall which was admitted as a voluntary statement, and I'm satisfied that the ammonia at Fieldian Gardens Arena site was spilled on the ground and ultimately ended up in the sewer system by this defendant, Hall's Refrigeration Limited, who was doing the job of service work on the equipment at the Fieldian Gardens Arena from which the ammonia sprung.

The fourth question is the one that gives the most difficulty for obvious reasons: the fourth question is whether the defendant, Hall's Refrigeration Limited, took reasonable care to avoid the prohibited act. What is the evidence which we have in relation to that? Well we have the evidence, as I have already alluded to, the evidence of Mr. Gregory Hall who gave evidence on behalf of the defendant. We have the statement of Mr. Ronald Hall that was admitted as a voluntary statement, and we have some other pieces of evidence that is relevant as well, but we have these two items of evidence mainly. The evidence then, I think, in looking at the evidence in the best possible light the defendant in this case... still not been able to conclude that due diligence was, in fact, exercised here. We know from Mr. Gregory Hall, as an employee of the defendant here, that he helped to leak off, filter the ammonia through this barrel of water to this drum of water. This process went on for sometime. He was not quite clear on that but as I understand it perhaps anywhere between 3 and 4 1/2 hours. This water was spilling over the ground and freely running away and being observed into the ground. This went on for at least that long and while he, Mr. Ronald Hall, looked around the building to make sure that other people wouldn't be in the area, to make sure that the contaminated water was disposed of properly, he was never really ever told anything about the storm sewer in the vicinity. You know that just does not seem credible under the circumstances. The pictures entered show certainly that the storm drain was, in fact, visible upon reasonable inspection. To allow this water to run anywhere from 3 to 4 1/2 hours over the ground in the area where a storm drain was, it just does not seem credible to me. Even looking at the evidence, it seems to me, in the best possible light for the defendant in this case I still can't come to the conclusion that due diligence was not, reasonable care was not taken to avoid this prohibited act. Now before I finish my judgement on this I would indicate that there was at least two other items that the defence brought up in its argument which contended would... the defence to a restrict liability offence, one being the fact that the procedure used here was one of reasonableness and that it is customary and the matter of disposing of ammonia to dispose of it in this way is a customary thing so that on that basis the defendant could not know that there would be an ultimate danger to the water by having disposed of the ammonia in this way. I really don't see... argument would succeed either even though it may, in fact, be under the right circumstances, be it a defence to a strict liability. I don't think it is enough to say that because I have always done so or because I understand that others have always done so allows me to escape liability in this fashion particularly when we are dealing with this kind of offence because it seems obvious that just because something was done once before, twenty times before, I don't know of any deleterious results and dangerous results in this adventure carried out. That doesn't mean that no damage was ever done before. So I don't really think that that was the defence in this case. Then there was the defence of necessity that was raised by saying that the matter was one of urgency when the ammonia valve was broken inside the arena. It was necessary to get the gas or the fumes from the ammonia out of the building because there were other people in the building and it might be a danger to those people. While I wouldn't disagree with that in any sense that it was necessary to get the ammonia out of the building at the earliest possible time. I think when you are dealing with the defence of necessity and due diligence it seems to me that you would remove the immediate danger and once the immediate danger is removed you make sure that no further danger is created by removing the immediate danger. It seems to me that having drained this water for over a period of 3 to 4 1/2 hours over the ground after getting it out of the building, getting the ammonia out of the building without really diligently checking around to see where that water was going to go. I mean it might have gone into somebody's basement. That does not seem to me to be a reasonable and sufficient on the ground of the defence of necessity.

So having said all that I have come to the conclusion that the defence has been made out on all its elements, and I would certainly conclude that I have no other alternative but to enter a conviction on this charge.

NOVA SCOTIA PROVINCIAL COURT

R. v. HODGSON

ARCHIBALD, Prov. Ct. J. New Glasgow, November 13, 1985

***Fisheries Act*, R.S.C. 1970, c.F-14 as amended - Accused found guilty of one count under section 31(1), carrying on a work or undertaking, resulting in the harmful alteration of fish habitat - Siltation in to Moose River - Defence of due diligence not established.**

The accused was charged with an offence contrary to section 31(1) of the *Fisheries Act*, R.S.C. 1970, c.F-14 as amended, carrying on a work or undertaking resulting in the harmful alteration, disruption or distruction of fish habitat.

The accused is a Scott Paper Company contractor who had been operating at the particular site intermittently for about five years. His crew was utilizing a machine called a forwarder to haul stumpage. The machine had chains on its tires and created ruts in the ground as the work proceeded.

Fisheries officers presented evidence, including photographs suggesting that muddy waters and siltation originating from the accused's work site, flowed in the body of a stream, rut or simply downhill, into a tributary of the Moose River and ultimately into the Moose River. There was no evidence of this siltation upstream of the worksite.

The defence contended that the Crown failed to prove:

1. That the accused himself carried on work which resulted in the harmful alteration of the fish habitat.
2. That the work carried on resulted in the harmful alteration of the fish habitat, and
3. That the defence of due diligence is available to the defendent and that the evidence has established that defence.

Held, the Court found the accused guilty.

The Court held that section 33(8) was applicable. That section says that "it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused..." Further, the accused was the person in charge by his own admission.

The evidence was clear that the work carried out by the accused the 28th of May, caused muddy water and siltation to flow from the work site in the body of a stream, rut or simply downhill into the tributary of the Moose River and ultimately into the Moose River. This caused siltation which was found to be present as late as early in November in the area downstream in the Moose River from the point where the muddy water had entered.

With respect to due diligence defense, the accused has to prove he took all reasonable care on the balance of probabilities. Here, the accused knew that the work he was carrying on, was causing the tributary to muddy. He may not have appreciated the extent of the damage that he was causing, however, he should have investigated to determine whether or not the muddy water and siltation were causing a harmful alteration of the fish habitat. He had an obligation to ensure that his work was not causing damage.

Clyde F. MacDonald, for the Crown.
T.E. Margeson, for the Accused.

ARCHIBALD, Prov. Ct. J.

The Defendant, McKay Hodgson, is charged, as amended, that he at or near Moose River in the County of Pictou, Nova Scotia, between the 21st day of May, 1985 and the 29th day of May, 1985 did unlawfully carry on work that resulted in harmful alteration of fish habitat contrary to Section 31(1) of the *Fisheries Act*, being RSC 1970, Chapter F-14, as amended.

Section 31(1) of the *Fisheries Act*, reads as follows:

> No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

I propose now to review the evidence adduced at trial. Fisheries Officer Brian Gillis gave evidence following a voir dire wherein an oral statement of the Defendant was held by me to be voluntary and admissible into evidence.

That statement was reduced to notes by Officer Gillis and was to the effect that the lands were owned by Mr. Hodgson who ran the operation at that site and who was the owner of a forwarder, which was employed there.

In addition, Mr. Hodgson in response to a question by Officer Gillis as to how many days had the river been muddy, answered "As long as we were working here. Some days when we work up above, it clears up over night. Then when we come back the next day, it gets muddy again".

Officer Gillis described the site as being at Moose River in Pictou County, Nova Scotia and indicated that the work was being carried on near a brook which is a tributary of the Moose River.

Officer Gillis produced certain photographs which were taken on May 28th, 1985 and depict ruts in a work area, a small brook and water running dirty in the ruts. Officer Gillis indicated that the muddy water ran all the way down but was clear above or upstream of the work site.

Officer Gillis said that upon following the water downstream the mud and silt were entering the Moose River from the brook. He said the muddy water had the appearance of chocolate milk.

He said there was a machine on the site, a forwarder, operated by one Kimball MacLeod. It had chains on the tires of the machine and the ruts appeared to be from this machine.

Officer Gillis directed some remedial work to be done in the area to help to alleviate the difficulty. Officer Gillis produced as Exhibit P-10 a map of the area which was prepared by Energy, Mines and Resources Canada and known as LOCHABAR 11E/8, edition 4.

On this map is depicted the work area which is on the tributary of the Moose River, upstream of Eden Lake, which eventually joins the East River St. Mary.

He described the river as forty or so feet wide above Eden Lake and stated that the total length of the river contained muddy water on the 28th and 29th of May, 1985.

Officer Gillis indicated that the road had been built onto the worksite and that the road had originally destroyed the stream bed at the site of the logging operation.

He said the area appeared to have been worked for some period of time. He believed that the stream was spring fed and he said he thinks he found the spring or at least the place where the water was coming out of the ground.

Some of it was run-off, he thought, and indicated that both May and June of 1985 were very wet months and that it had rained heavily on the 27th day of May, which caused all of the brooks in the area to be filled with water. At this site, he said, a large area is cleared.

Officer Gillis indicated that he followed the muddy brook downstream. He said that he felt that the original stream had been destroyed by the machinery and that the water from the stream was running down the ruts caused in the stream by the forwarder machine.

He indicated that whether this was a stream or a gutter that if it affected a fish habitat he would cause a charge to be laid. He said the dirty water was coming from the worksite and eventually down into the river.

Officer Gillis would not agree that the water was just run-off. He said he would have expected that once the operators found the river to be discoloured that they would have contacted his department for him along with the fisheries biologist to then be available to give the operator such assistance as might be required.

Officer Gillis said he formed the impression that Mr. McKay Hodgson was aware of what was going on but didn't care. He indicated there were no fish in the area where the machine was operating. He said he was advised by the Defendant that he was finished at that site and that the Defendant wasn't going to take any logs out because it was causing mud and the Defendant then closed down the operation. No water, which was affecting the river, was coming down the ditches adjacent to the road at that time.

Fisheries Officer Cameron gave evidence much to the same effect as Officer Gillis; he indicated that the muddy water in the work area ultimately flows into the river.

He described how they tried to divert water to prevent further damage and that the Defendant had his forwarder assist in doing so. He said he couldn't find any other streams in the area which were causing muddy water to flow into the river.

Officer Cameron indicated that he did not know the definition of a stream and was unable to say whether or not a gutter could become a stream. However, he was able to say that in his opinion, the area that looks like ruts in some of the photographs is, in fact, a stream.

He said it is a stream because of the volume of flow but concedes it is difficult to tell a stream from a gutter or from machine tracks.

He described the area as depicted in a photograph, Exhibit P-8, which shows how the muddy water was flowing from the tributary stream into the Moose River.

Fisheries Officer Barnes in his evidence described how, as a result of a telephone call on the 28th of May, he went to the site of the small tributary joining the Moose River and indicated that the water upstream was clear.

He described the silt entering the Moose River as is depicted in photograph P-8. He described how samples of water were taken and given to Mr. Phil Zamora who was present at that time. Different samples were taken in different places.

He said he talked to Kimball MacLeod who was operating the forwarder machine at that time and directed Mr. MacLeod to divert the muddy water from the tracks, into a swamp.

He took a number of the photographs which have been tendered into evidence. He said that he also saw discolouration in the water which he traced down as far as Garden of Eden Lake but that he saw no pollutant above the tributary stream in the river.

The water above the tributary stream in the river was clear. A sketch of the area, P-11, provides a Plan view of the area and this witness described how the water between the areas marked as "M6" and "M4" contained dirty water whereas the water at "M2" and "M I" was clear.

The witness described how the water in the area of the site eventually runs to the Moose River. On that date, there was a constant flow of muddy water.

He described their concern in the Moose River since it is a rearing ground and habitat for Atlantic Salmon and Speckled Trout. Indeed, the Moose River was open to trout fishing at that time.

It apparently was also open for salmon but no adult salmon were present at that particular time of year. Later in the year, however, some of the best spawning grounds, living area and nursery of baby salmon were in the Moose River.

Officer Barnes further indicated that this was the first time he was in that area and from his observation it was obvious that work had been going on there for some time.

He didn't think that diverting ditches would solve the problems, only alleviate them. He thought operations could be continued in such a manner so as not to damage the fish habitat.

He thought the machine could be re-routed so as to avoid damage. In his opinion, all rivulets are streams and that any flowing water is a stream.

He said that it is entirely possible mud got into the river because of the wet weather. He thought that it was quite apparent that some procedures were not carried out so as to avoid damage.

He allowed that it had been a wet spring and it was very wet. He said that he did not walk the tributary stream and therefore couldn't say if other streams entered or not but disagreed that the work area was a mere run-off.

The stream, he said, that goes through the woods has no name and is not shown on the chart (P-10) and that the incline is steep in places.

He indicated that the Defendant co-operated with them. He said that the pollutants, to some extent at least, would have gone to the river in any event that day.

Officer Barnes further indicated that in the river that day there were present immature salmon and trout and that the pollutants placed them in danger. He conceded that there are natural dangers to fish in any event.

Some days later he was back on the site and the water was clear. He said, however, that once the bottom of the river is polluted, it can stay polluted for years.

The water clears up, he said, but not the bed.

Philip Zamora gave evidence having been qualified as a Fish Habitat Protection Technician. He said he has been so involved for a period of fifteen years. His job, among other things, is to give technical assistance to fisheries officers.

He said that the Moose River was brought to his attention on May 28th and that he traced the muddy water on that occasion. He said he went to a tributary stream that seemed to be the source of the muddy water.

Mr. Zamora indicated that he and Officer Barnes met at about 3:30 on that day to investigate the matter and took suspended soil samples and surveyed the stream to assess its viability as a trout or salmon stream.

He walked the silted area of the stream and made observations. He drew the sketch (P-11). On May 28th, he could not see any fish since the river was too muddy.

On the area of P-11 marked "M1", he could see organisms on the bottom but no fish. Downstream of "M1" was too silted to observe. In the area of "M2", he could see no insects on the bottom.

He indicated that he visited the site a few times later in the summer but on those occasions the area marked as "M2" was not flowing.

On June 4th, 1985, he went back to the site to electro-fish. No work was going on at that site at that time.

He has been back on other occasions since that time to ascertain the status of the streams and to refresh his memory as to the state of the brook. The stream shown as "M l" was flowing during every visit, "M2" however, was not.

He described various other photographs which were taken on June 4th at which time the water had cleared up and was described by him as "not too bad". The bottom, however, he said was heavily silted as is shown in photographs P-16 and P-17.

He produced other photographs of the area showing the streams and brooks to be clear. He said that at the point where the tributary enters the Moose River, the water was clear on June 4th, but there was a band of silt near the bank where the tributary enters.

He also produced photographs of salmon and trout which had been electro-fished on June 4th in the stream approximately 600 meters below the work area. Further electro-fishing was carried out on July 30th, at which time, trout were found in the stream as close as 200 meters below the work area.

He found fish all through the tributary stream, both fry and trout. In the main river, he found salmon parr.

Mr. Zamora described how the muddy water samples had been taken on May 28th in a clean bottle and taken to the laboratory where the water was washed through a filter under vacuum.

He produced a table, Exhibit 20, which contains the results of an analysis carried out by him. He indicated that damage to a fish habitat can occur when suspended solids are present in water at 25 milligrams per litre.

This chart shows that at some sampling points the analysis indicated a level, for example, at ".M3" of 3497 milligrams per litre, at ".M4" at 9275 milligrams per litre, and at ".M5" of 3161 milligrams per litre, at ".M6", 950 milligrams per litre.

Mr. Zamora indicated that the Defendant's remedial efforts on the 28th of May did help alleviate the situation somewhat. Mr. Zamora produced into evidence Exhibit P-29, which is a pamphlet produced by Fisheries and Oceans Canada entitled *A Guide to Trout and Salmon Habitat for Loggers.*

Mr. Zamora pointed out certain paragraphs of that pamphlet particularly "Recommended Guidelines" on pages 8 and 9. Mr. Zamora said that in his opinion, the skidder going through the stream bed caused the stream to flow down the machine tracks and ditches and this caused 90% of the siltation.

He said it was hard to tell precisely where the stream was in the work area since the area was so torn up by the machine. He said the stream is intermittent flowing water with sufficient qualities to sustain fish life.

He said that no other streams in the area caused problems on that date. He said the stream in the work area was spring fed.

In his opinion, the gravel cover and bottom quality there were sufficient to convince him it was a viable trout stream. He said a stream required oxygenated water and a grade.

He said ditches along logging roads don't look like fishing streams since there is not enough flow of water. Road building can be offensive to his Department because of the damage it causes to streams.

He said, in his opinion, that a ditch can become part of a tributary stream if road construction interferes with natural flow. It is the damage in the work site that caused the absence of fish within 200 meters of the work site. He said when he first saw the stream it took as much as ten minutes to determine that it was, in fact, a stream.

The lower area is obvious, he says. In his view, if it does not support fish life, it is not a fish stream. He conceded it is possible for a person, not as expert as he, not to know or be able to distinguish a fish stream.

He said however, anyone would know that the area marked as "M5" in P-11 was a fish stream and any person should know from seeing the brook or river silted that damage was being caused.

On May 28th, he didn't order any further remedial action since he understood the work was finished. At that point, he said, no study was done to determine whether or not the river bed was damaged. The samples he took didn't show the effect on the river bed but he said that it may take a long time for the river to improve.

Andre Ducharme, a Senior Biologist with Fisheries and Oceans Canada, presently stationed in Halifax, was qualified as an expert on habitat requirements of anadromous fish species (salmon, trout, gaspereaux) and fresh water resident fish species, on the identity of fish habitat and the recognition of habitat alterations and disturbances.

His curriculum vitae are contained in Exhibits P-30 and P-31. Mr. Ducharme visited the river on August 8th, September 9th, and November 4th, 1985. Mr. Ducharme provided several definitions including the following:

> A STREAM: A natural body of running water permanent or intermittent occurring naturally on the surface of the earth and in which live organisms, including fish, can be found.
>
> A DITCH: A man-made structure usually designed to catch, retain or guide surface run-off or ground water sources usually to prevent water from flooding or damaging other man-made structures.
>
> FISH HABITAT: Trout require cool clean water, fairly productive waters, with organisms such as aquatic insects. Trout require a lot of cover, such as shade trees, keeping water cool with undercut banks, boulders, cobbles, etc., with water quality containing lots of oxygen. Trout are shy and require a lot of cover and live in smaller rivers and lakes requiring clean gravelly spots to lay eggs. Salmon are the same as trout but not quite as shy and may be in the middle of a stream since they don't require the same degree of cover.

> Adult salmon rely on speed to escape. Juvenile fish seek cover in a flood and from larger animals in spaces between rocks known as interstices.
>
> ANADROMOUS: A fish that grows and matures in oceans and migrates to fresh water to reproduce.

Mr. Ducharme indicated salmon must have access to oceans. He indicated that both salmon and trout are old species of fish. Silt, he defined, as coming in a variety of sizes of material from 2/1000 of an inch to 1/2 of an inch. Clay is fine and silt originates from soils. Silt can be mineral or organic.

Mr. Ducharme states that 80 milligrams per litre of silt is a threshold not to be surpassed. Soil can be suspended in water and this suspension is a transient state and will settle when the water stops moving.

He indicated that some other agencies say that 50 milligrams per litre is the threshold. However, his department imposes the 80 milligram per litre as a limit on proponents of works in streams. 80 milligrams per litre for a few hours may not be too severe and is usually tolerated by his Department but if they knew that 80 milligrams would last for days or weeks then they would use a differernt level.

In some situations, 5 to 10 milligrams per litre might be the maximum permissible in a sustained situation, in a pristine stream for example, 80 milligrams per litre can be deadly if sustained for a long period of time.

He said that the life history of a speckled trout or salmon begins with eggs buried, in a period of mid-October to mid-November, in clear spaced gravel.

The eggs are left and the parents go away. The eggs stay in the gravel for a period of about five months when they hatch as sac fry, approximately 3/4 of an inch long and without the ability to swim freely.

These sac fry stay in the gravel for about four weeks, up to 18cm below the surface of the gravel. In April, the sac fry swim up through the gravel to the bottom of the stream. That is why it is so important that the gravel not be silted so as to restrict their passage.

There must be a flow of water and oxygen around the eggs to wash away waste that would otherwise smother the eggs. He said that it is dramatically important that there is no silt.

Silt does not wash away quickly and could last on a stream bottom for years. The impact, he said, is severe and long lasting, up to 5 or 10 years.

Man, he said, has no technology to clean up the silt in an economic manner. The damage, therefore, is irreparable.

Mr. Ducharme stated that small tributaries are six times more productive than large streams. Anything put in a stream would go into the river; if a massive or extreme amount, the river is damaged.

He produced a series of photographs which were taken on November the 4th. He said that the 1985 brood of fish is missing in the Moose River and in the area within 200 metres below the work site there are no fish or bottom fauna at all, but that this area contains the proper elements of a fish habitat.

He said that at the site, the criss-cross tracks of heavy vehicles created ruts that caused the stream to follow the ruts. In his opinion, the work area is a fish habitat completely destroyed. It is dead for now.

It is not now a fish habitat but upstream of the stream there are found caddis flys and chironimids. These are insects found in a stream and are basic food for speckled trout and salmon.

He said the water quality was excellent at the source except for the silt. The stream is a series of pools and rifles, he said, and these insects are found in the stream, upstream of the work area.

He said that now there is too much silt and mud in the gravel of the stream for spawning. Eggs will be less successful or fail entirely because of the silt.

He said there is a gross difference between a fry he found downstream and twelve fry he found upstream. The muddy water, as shown in the photographs, is deadly.

It will kill vegetation, mosses, and algae and will kill the bugs. Sac fry and young fish were also killed being choked by the silt.

In his opinion, he said, the work area has been destoyed as a fish habitat. Another long range effect, he said, is that three of four years from now, fewer grisle salmon will return to spawn because the 1985 brood from that area is missing.

Additionally, several years may be required for the silt to be cleared up. This will continue to run downstream each year until the work area has cleaned up and grown over.

The work in the cut area, he said, caused the silt. He said that a sustained heavy silt release occurred in the streams and ran into the Moose River.

Mr. Ducharme said he knew nothing about this site in May, 1985, until it was subsequently brought to his attention. He said that everywhere competing interests are at work and that here opposing but not necessarily antagonistic views are present.

His department, among other things, tries to assist in providing technical guidance to avoid a situation such as was found at this site.

The normal procedure of loggers and others, he said, is for a proponent to apply for and receive a permit based on a proposal made by a proponent. In this situation, he said, there was no adherence to the guidelines which he termed a "blatant disregard".

In his opinion, the photographs shown on page 1 of Exhibit P-32, namely the work area and the portion immediately downstream of the work area, is a stream beyond a shadow of a doubt.

The stream begins at the spring which is its source, he says, and that bugs such as he produced are not found except in streams. Every place where such animals exist is a stream.

He said that if it does not look like a stream from the photographs it is because of the trees having been cut, a large amount of slash, the undercut banks crushed out of existence but even so, Mr. Ducharme said, the elements of the stream are still there.

He is convinced that it was a stream. He said that the silt was a massive problem and that no technology can repair the damage and the damage is on-going because of the silt, which during every rain and snow melt, continues to flow downstream.

He made suggestions as to how the work could have been continued and offered guidelines as to how damage could have been avoided, along with other recommendations.

Mr. Kimball MacLeod also gave evidence. He is an employee of the Defendant and was engaged in cutting pulp and running the machines. He was the operator of the forwarder machine on the 28th of May and is indeed shown in one of the photographs talking to the Fisheries Officers.

He said that Mr. McKay Hodgson was the owner of the machine. He said that when he began at the site there were some trees standing and some had been felled.

He operated the machine with chains all the time because the ground was so soft. McKay Hodgson, his boss, also drove the forwarder on occasion and instructed him as to where and how to drive the forwarder and signed his pay cheques.

He said he worked at the site for a week or so before Mr. Hodgson came there. The wood shown in certain photographs, he said, was hauled by him out of the woods.

He said he told a Fisheries Officer that the place where he was operating the machine looked like a brook to him at times. When he first started, he said, it was dry.

The pulp cutters in the area were working for McKay Hodgson, he said. He showed them where to cut and fixed things that broke such as a flat tire on the forwarder.

He said they stopped working there the day that the Fisheries Officers said they were making a mess. He said the area was very wet in May and that it had been an extraordinarily wet Spring with lots of water flowing around.

He said that in his opinion, a brook is water running but that he saw no evidence of water except in the tire tracks. When he started, there was no water at all. There was no natural flow of water nor any springs that he observed.

He said when the Fisheries Officers were there he did as he was asked by them. He said they were complaining about us putting muddy water in the Moose River. He said he took no steps to determine where the water went nor did the Defendant to his knowledge.

Mr. Nick Williams who is a Purchase Woods Supervisor for Scott Paper Company gave evidence as to how sometimes his company finances operators to buy stumpage. Part of his job is to see that this is carried out in accordance with the rules and regulations of his company.

Exhibit P-34 are guidelines for harvesting pulp in Nova Scotia. He said operators are instructed generally in accordance with the manual. He said that McKay Hodgson owns the lands with which we are concerned here and is a Purchase Wood Contractor and has been so since 1979.

He has worked closely with McKay Hodgson for the last five years. He described himself as a forest technician having attended Forest Ranger School in Fredericton in 1970 and having taken other courses.

He is not familiar with Fisheries and Oceans publication, *A Guide to Trout and Salmon Habitat for Loggers*. Mr. Williams said that Hodgson worked at this site intermittently for four or five years.

He described Hodgson as one of the better contractors and one who is quick to remedy any problems. He said that on May 28th, which he recalled as a rainy day, he dropped into the site to see how things were going. He observed a lot of run-off in the brook.

He said he was not alarmed by it but that he didn't like it. He said that because of these problems with the rain he didn't want to send the workers home.

He said this was no more than a usual problem with the environment. He has seen just as bad before. He said the muddy water would bother the streams. He felt it should be filtered enough by the time it got down to the stream.

The muddy water, he said, was coming out the skidder tracks. In his opinion, it was run-off but not a brook.

He said it was not a natural brook or stream, in his opinion, but just a trickle of water from the spring since it was just in the wheel tracks. He said the problem was created because it was a wet Spring and he attributes it to the rain.

To his knowledge, no work has been done on this site since. He said that since that time he has checked silting and that he had gone up other pulp roads and found damage and silting at many other places.

He thought this was abnormal and has been caused by the weather. He said that even at other places that have followed guidelines, there has still been silting.

The problem, he said, was weather, terrain and ignorance. He said he has been in the business twenty years. He observed the work site himself and didn't think anyone should get charged for what he saw.

He said there was nothing that could be done except stop working. He was not aware of any instructions given to Mr. Hodgson to do anything.

He said that a site such as this would normally be cut in the Winter or Summer. He said he was on the site again in July. He said that the 28th of May was the only day the Moose River was muddy.

He assumed that it came from a brook which went into the Moose River. In regards to the evidence of Mr. Ducharme, he said he agrees with all of that evidence except as to whether or not the water running in the tire tracks was a brook.

In his opinion, he said, it was merely spring run-off in the tire tracks. He said that he had had no consultation with the Department of Environment but that from now on they would try to do things differently.

He indicated that the Manual, Exhibit P-34, contains suggestions as to how to work in areas where there are streams. He said, however, that any wheeled vehicle agitates the mud and creates silt which will flow downstream. He also said that he knows of the Moose River having been muddy on other occasions.

He does not condone the destruction of any habitat and said that he has taken courses in regard to siltation. He said, in his opinion, the sedimentation was due to heavy rain.

He produced a number of photographs which were taken by him.

James Seymour Lawyer is a Manager of Special Products for Scott Paper Company and was Acting Timberlands Manager at the time in question. He has known McKay Hodgson for twenty years as a Purchase Work Supplier.

He said that he traversed the area in 1983-1984 and in 1985 after the wet period. He said McKay Hodgson is "A-1" unequivocally.

Prior to the flooding, there was no problem. He thought that this was an unusual situation created by the wet weather and that it is unfortunate that siltation took place.

He thought that McKay Hodgson acted as a reasonably prudent operator in stopping operations voluntarily at that time. Nothing, he said, would suggest he do more.

It might be necessary, he said, to make a major change in technique if it continued to be wet in that area. He said he believes McKay Hodgson to be an honest and sincere contractor.

He knew of situations where Hodgson has not cut because he thought it would affect the environment. He said that the water in the work area did not look like a stream to him but like tracks or ditches.

He didn't go up there in the spring but he said he would call it at best an intermittent brook. He said he had no conversations with the Environmental people.

He said that he was hunting in that area in 1983 and 1984 and then after he became aware of this charge before the Court he went to the area, started at the culvert and went down the brook.

He checked for silt. You could see it, he said. He drank the water. He said he walked to the highway and there was still silt present right to the bridge on the Moose River.

The water was not brown then, he said, but he did not know when this was. If the Moose River was running muddy, this should tell a prudent operator, he said, to stop operating. Such an operator should take precautions to see that it didn't happen again the next day.

Toxicity, he said, would make a prudent person stop operating. He said that a prudent operator would find out where the muddy water was going.

The Defendant, McKay Hodgson, gave evidence to the effect that he is a Scott Paper contractor and has been in this business for nineteen or twenty years and is familiar with the materials contained in the Environmental Policy Manual Exhibit P-34 and states that he has known about the contents of the Manual for seven years.

He said that he hasn't specifically read this Manual but that the contents have been available otherwise for several years. He said he has read Exhibit P-29, which is the Fisheries and Oceans *Guide to Trout and Salmon Habitat for Loggers.*

Mr. Hodgson said he had seventeen or eighteen men at this site and had worked there for the past five years intermittently. This site was used when no access to other lands was available.

He said he was hauling in the area behind what is shown in photographs P-6 and D-2. He said he took all reasonable precautions to prevent such a problem as this occurring.

He put in a culvert to take run-off into heavy woods to filter the water. He was aware that water in tire tracks could get into the brook and river.

He figured he did all he could do. No one ever told him before he was doing anything wrong.

He said he didn't know the muddy water was getting into the river. He said when the Officers came to the work site, he was read his rights then told water was going into the river, whereupon he immediately said that he would stop his operation at the work site.

The Officers, he said, told him to put the brush into the brook whereupon he said there was no brook, it was only a ditch. Water will follow the ditch or the tracks from the machine.

Mr. Hodgson said he thinks he knows what a brook is but that no one ever said before that that was a brook. He said he knew water would go in a brook downstream but would be filtered by the time it got to the river.

He said that on May 28th every brook he came to was running red. Further up the Moose River, a mile and a half, all the river was red. He said that he didn't think he dirtied the river anymore than anyone else.

He said water turns red when you work around it and that this was caused by the weather. He didn't think he was doing anything wrong on that day.

He said he had seldom seen such bad weather coupled with being on a hill. He said, in fact, he took extra precautions because it was so wet.

He had not been involved with the Fisheries Officers before. He said the forwarder was owned by him but that he was not driving it himself at the site because he was hauling wood at another location.

He agreed that the water shown in photograph P-4 is flowing and that this muddy water is going through the culvert into the woods.

He said he never went down to the brook to check to see if the water there was muddy that day. He also said that he had generally told his operator not to drive the machine into any brooks but did not specifically mention the body of water in photograph P-4.

He said that it is his land and he felt that he could go into that water but that he gave no instructions to his operator since he was not concerned with the water in the ruts.

As far as he was concerned, if was just water running ahead of the machine. When the Officers said, he was making trouble, he immediately stopped even though he had not been told to stop.

At this juncture, it is appropriate to consider the matter of credibility of the witnesses. It is not unusual for witnesses to become something of an advocate for one side or another. Such was, indeed, the case here.

Generally, however, there were no great discrepancies in regard to observations but rather discrepancies in relation to perspectives particularly in regard to whether or not the work site contained a stream. In these circumstances, I find the expert witnesses to be credible and I find also that where there is a discrepancy or disagreement between any of the evidence then I prefer the evidence of the Fisheries Officers, including the two experts, to the evidence of the others.

It is urged by the Defence that the Crown has not proved, beyond a reasonable doubt, that the Defendant is guilty of this offense.

The Defence urges that the Crown has failed to prove:

1. That the accused himself carried on work which resulted in the harmful alteration of the fish habitat.
2. That the work carried on resulted in the harmful alteration of the fish habitat, and
3. That the Defence of due diligence is available to the Defendant and that the evidence has established that defence.

In regard to the first defence put forward by the Defendant, it is clear, from the evidence of the Defendant himself, that he was carrying on the work at the work site on May 28th and 29th.

He quite clearly was the person in charge, by his own admission. He quite clearly was the person in charge by the evidence of Kimball MacLeod.

He was also quite clearly the contractor according to the evidence of the two officials of Scott Paper Company.

Section 33(8) applies in respect of an offence under Section 31 and provides:

> "In a prosection for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission."

In my opinion, Paragraph 8 is sufficient to establish that it was the accused who carried on the work at the time and place alleged, either vicariously or otherwise.

I find, therefore, that the accused carried on the work at Moose River in the County of Pictou between the 21st day of May, 1985 and the 29th day of May, 1985.

Next to be decided is whether or not this work resulted in harmful alteration of fish habitat. The evidence is clear that the work, being carried out on the 28th of May, caused muddy water and siltation to flow from the work site in the body of stream, rut or simply downhill, into the tributary of the Moose River and ultimately into the Moose River as is shown in the photographs.

This caused siltation which was found to be present as late as early in November in the area downstream in the Moose River from the point where the muddy water had entered. No such siltation was found upstream.

The natural and logical inference is that the muddy water from the work site caused the siltation which was still present in the river on November 4th. Indeed, Mr. Zamora said, that when he attended on June the 4th, that the bottom at that time was heavily silted.

This unquestionably was the same silt that was present in November when the site was attended by Mr. Ducharme.

Fish Habitat is defined in Section 31(5) of the Fisheries Act and means "spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes".

Clearly, the Moose River, the tributary and the areas described by Mr. Ducharme were fish habitat and were harmfully altered by the work that was carried on at that time and place.

I have no doubt in that regard. I am, therefore, satisfied that the Crown has proved beyond a reasonable doubt all that it is necessary for it to prove.

However, the Defendant argues that the defence of due diligence is available to him. It is clear from *R. v. Sault Ste. Marie* 3 C.R. (3d) Page 30 wherein Dickson J. (as he then was) at Page 52 says:-

> "I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

> 1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed or by additional evidence.
>
> 2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Estey C.J.H.C. so referred to them in Hickey's case.
>
> 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.
>
> Offences which are criminal in the true sense fall in the first category. Public welfare offences would, prima facie, be in the second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly" or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the legislature had made it clear that guilt would follow proof merely of the prescribed act. The overall regulatory pattern adopted by the legislature, the subject matter of the legislation, the importance of the penalty and the precision of the language used will be primary considerations in determining whether the offence falls into the third category."

The Defence argues that the instant case fits within the second category as set out by Dickson J. (as he then was) and that the defence of due diligence is open to the accused.

I find as a matter of law that the defence of due diligence is available for the Defendant to advance and that it is for the Defendant to establish that he took all reasonable care.

At this juncture, it is necessary to say that the Defence must do more than raise a reasonable doubt as to whether or not he took reasonable care. The Defendant must prove he took all reasonable care on the balance of probabilities.

Has it been proven on a balance of probabilities that the Defendant did all that a reasonable man would have done in the circumstances? In this case, we have ruts or streams, by whichever they are called, and in my view it matters not, running red with mud and silt.

This mud and silt flowed, either by way of the stream or simply downhill, until it came into the tributary and on down into the Moose River.

According to what the Defendant told the Officers, it had been doing so for days and when they would stop, it would clear up and when they would start work again, it would again become muddy.

The Officers very easily concluded that the source of the mud in the river was this work site.

I conclude that the evidence is clear. That the Defendant knew that the work, which he was carrying on, was causing the tributary to be muddy.

He may not have appreciated the extent of the damage that he was causing or the effect it might have been having on the fish habitat or the fish themselves.

However, I am satisfied that he knew that the work he was carrying on was causing muddy water and silt to be carried into the river and that he should have investigated to determine whether or not the muddy water and siltation were causing a harmful alteration of the fish habitat.

In my opinion, an ordinary layman would be aware that muddy water and silt would affect the river. Indeed, he had been instructed by his employer in that regard.

Guidelines had been given to him by his employer and indeed, he said that he had read *A Guide to Trout and Salmon Habitat for Loggers* as prepared and distributed by Fisheries and Oceans Canada. He said he figured he did do all he could but if he could not stop the problem than certainly it must have been incumbent upon him to stop the work.

He said he didn't think he was doing anything wrong, but he had an obligation to ensure that his work was not causing damage. If he did nothing to ascertain the extent of any damage, then certainly that is akin to wilful blindness.

He said he never went down to the brook to check. He said it is his land and he felt he could go into that water.

Any activity, whether he went into the river of not, which causes a harmful alteration is an unlawful act.

I find, therefore, that the accused did not take all reasonable steps to prevent the harmful alteration, disruption or destruction of fish habitat.

Indeed, Mr. Hodgson must have known that his work was causing the river to be muddy and that the muddy water was not caused simply by the rain.

The defence of due diligence, therefore, must fail.

In the result, a conviction is entered against the Defendant.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. HUGHES AND VAN STRATEN

SCOW, Prov. Ct. J. Port Coquitlam, January 9, 1985

***Fisheries Act*, R.S.C. 1970 c.F-14, as amended - Accused acquitted from charges under section 33(2), depositing a deleterious substance into water frequented by fish and section 31(1), the harmful alteration, disruption or destruction of fish habitat - Baker Creek - Whether water "frequented by fish."**

The accused were operating a cat on property adjacent to Baker Creek following which muddy water was observed in the creek by another property owner. A conservation officer took a number of water samples and set fish traps at different locations in the water. The results were compiled in a report submitted to Crown counsel.

Held, the section 31(1) charge and the section 33(2) charge against both Hughes and Van Straten were dismissed.

There were substantial problems with the evidence. Water samples were taken at various locations in the muddied water but not at the source. The conservation officer's report was different from his evidence in court. The evidence was not satisfactory on the ownership of the property. As the conservation officer admitted on cross-examination that the water adjacent to the property where the works were being conducted could be dry at certain times of the year, the Court concluded that the waterway was not "water frequented by fish" nor a "fish habitat".

The Court found that the other waterway in question was "water frequented by fish" and "fish habitat" but because of the possibility of some other errors could not conclude that the deleterious substance was indeed deposited there.

In addition, the lack of knowledge of the presence of fish before the works ever started, a lack of knowledge the court held as reasonable and probable at the time, constituted a defence to strict liability.

Further, "Baker Creek" was an averment that the Crown had to prove and the evidence fell short of proving this was Baker Creek.

Ms. F. Gordon, for the Crown.
R.J. Levenson, for the Accused - Mr. C.R. Hughes.

SCOW, Prov. Ct. J.

I've reviewed the submissions and the evidence in this case many times trying to arrive at a definite conclusion as to what the facts are. And, there are a number of problems as far as the evidence is concerned on the proof beyond a reasonable doubt.

It is my intention to write a more detailed judgment for counsel and I had planned to be probably quite lengthy on my reasons for judgment but I've decided that I will abbreviate my reasons.

There appears to be, in this case, no doubt at all that John Van Straten was operating a cat at 1235 Pitt River Road, Port Coquitlam, British Columbia, on a property adjacent to this creek or ditch that has been -- I'll refer to as Baker Creek. And, that there is some evidence that Charles Hughes was seen on that property near the cat and was spoken to a number of times by Mr. Elliott, the conservation officer. And, that Mrs. Crocker saw the operation from her house and sometime later in the morning, she went down to the creek that is adjacent to her property and saw muddy water. On cross examination she did indicate that she did not know when that muddy water started. And, water samples were taken by Elliott at different locations and fish traps were set containing an attractant, at different locations in this water. And, as far as this body of water is concerned, adjacent to 1234 Pitt River Road, of a conservation officer and he's indicated that he has never attended at the source of this water and he admitted on cross examination that the size of the water adjacent to the property where the works were being conducted, could be dry at certain times of the year. And, he did say that there was another tributary of -- going into this body of water between 1234 Pitt River Road and 1980 Harbour Drive, which added to the waterway adjacent to the Crocker property. And, there were in the evidence, some aspects of Elliott's evidence, that gave me some concern as far as the whole of his evidence was concerned and it was in relation to a report to Crown Counsel that he said he checked before submitting it and checked it thoroughly and as far as he was concerned, it was correct and it was different from his evidence in court and he could not explain that difference. And, he admitted on cross examination that there could be a number of -- there could be other discrepancies that he was not aware of.

And, in addition to that aspect, there is some areas of doubt on the conversation that Elliott had with Hughes and with Van Straten. It was the property in question probably belongs to Charles Hughes but the evidence before the Court is -- is not in my view satisfactory on the ownership of the property for me to infer control by Hughes. In addition to that, the areas of the evidence relating to the body of water seems to be that there was no link between the ravine and the creek to satisfy me that they were one and the same thing and that -- and that the knowledge of Hughes and Van Straten as far as the creek is concerned seems to be left at -- he had, Hughes at least had no knowledge that there was any fish in the water.

So, that I have no problems on the evidence such as it is, concluding that the waterway adjacent to the property at 1234 Pitt River Road was not water frequented by fish or fish habitat because of the fact that it probably dried up and also because of the fact that the attractant used in the trap probably attracted the small fish that were trapped and that at other times the larger fish had been seen in the area and that the small fish probably were forced to go elsewhere to seek food and were probably attracted upstream. And, had there been a clear evidence evidence on the exactness, or the preciseness of the evidence of Elliott, I might have been able to conclude that the water adjacent to the Crocker property was certainly rendered endangerous to fish habitat and to the fish. But because of the possibility of some other errors, I could not conclude that the deleterious substance was indeed deposited there although I have no problems in finding that the waterway adjacent to the Crocker property was water frequented by fish and fish habitat.

In addition to those aspects of the evidence, the fact that Hughes had no knowledge, according to the conversations, that any fish frequented the waters. That was another aspect of the case that caused me problems because I have considered that together with the evidence of Elliott, that he had no knowledge until April 21st or the 20th, or one of those days, when he set the traps, that any fish was in these waterways. So, that the absence of knowledge on the part of Hughes seems to be reasonable and probable and that at that time, or before the works ever started, had he gone to Elliott, Elliott would have probably told him the same thing that he knew -- that there was no fish there.

So, I'm also left with the conclusion that the lack of knowledge was a factor in constituting, not then (sic), but constituting a defence to the strict liability. In addition to all of this, I had problems with Baker Creek in the charge because it is not stated to be known as, but it is definitely Baker Creek in the charge and that in my view, is also not just a particularization, it is an averment that the Crown must prove and the evidence falls short of proving that this is Baker Creek.

So, briefly, for all of the reasons that I've briefly mentioned, I feel that I must dismiss the charge as -- against both, or the charges as against both Charles Hughes and John Van Straten.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. JACK CEWE LTD.

HOLMES, Prov. Ct. J. Burnaby, November 13, 1987

***Fisheries Act*, R.S.C. 1970 c.F-14 as amended - Accused acquitted of charge under section 33(2), depositing a deleterious substance into water frequented by fish - Sediment into the Coquitlam River - Court found the material deposited to be deleterious but was not satisfied that it was coming solely from the accused's property - Defence of due diligence successful.**

The accused was charged with an offence under section 33(2) of the *Fisheries Act*, R.S.C. 1970 c.F-14, as amended, depositing a deleterious substance into water frequented by fish. The accused owns a gravel pit operation near Coquitlam. The Crown primarily relied upon evidence in the form of samples of sediment collected by a fisheries biologist at the edge of the Coquitlam River and tests measuring the turbidity and non-filterable residue of the water at the sample site.

The defence witness agreed that the readings and samples indicated a substance harmful to fish. The Crown argued that the coarse sands, small pebbles and clays collected at the river comprised sediment that came entirely from stock piles along Pipeline Road, belonging to the accused.

The accused raised the defence of due diligence and led evidence to demonstrate its commitment to environmental protection. This included the expenditure of about one point two to one point five million dollars towards environmental protection implementing programs and the formation of a committee with company and government respresentatives to monitor pollution along the Pipeline Road.

Held, the accused was acquitted.

The Court was satisfied that based on the evidence before it, the material from the outfall of the culvert to the river was in fact a deleterious substance. However, the Court did not accept the inference that the matter coming out of the culvert was coming solely from the sediment stock pile located on Cewe company property. Evidence presented by the defence suggested other sources for the material in the ditch such as the roadside of the ditch or a further ditch south from where the stock piles were located.

The Court also held that the company took all reasonable steps to contain and solve their environmental problems. The company had participated in a committee comprised of members from Government ministeries who had not identified a problem with a berm located along the ditch. The company had done all the Ministry of Environment had directed they do, pursuant to a request in 1985 to do some work. Further, the company had spent a minimum of one point two million on environmental protection and implementing programs.

J.D. Cliffe, for the Crown.
J.J. Reynolds, for the Accused.

HOLMES, Prov. Ct. J.

The company is charged that on the 15th day of November 1985, at the gravel pit operation of Jack Cewe Limited, at or near Coquitlam in the Province of British Columbia, did unlawfully deposit or permit to deposit the deposit of a deleterious substance, to wit: sediment, in a place, to wit: the west ditch of Pipeline Road adjacent to the sediment stock piles south of the gravel wash plant under conditions where such deleterious substance entered water frequented by fish, to wit: the Coquitlam River, in violation of Section 33(2) of the *Fisheries Act* and did thereby commit an offence contrary to Section 33(5)(b) of the *Fisheries Act*.

This trial began, and the evidence was heard on March the 25th, 26th, 27th, 30th and 31st. April 1st, 3rd, 14th, 15th 16. July 6th, 7th, 8th, 9th, 14th, 15th. August the 28th, 31st. September the 2nd, 21st. Submissions and arguments were heard on October the 7th and the 13th.

There were six witnesses for the Crown and one in rebuttal. There were six witnesses for the Defence.

There are three questions to be answered. One, is the material deposited at the delta of the Coquitlam River as represented by Exhibit 5 a deleterious substance deposited in waters frequented by fish. Two, is the material so deposited only from the sediment stock piles along Pipeline Road owned by Jack Cewe. Three, has the Defence established on a balance of probabilities that it exercised all reasonable care or due diligence to avoid or prevent the commission of the offence charged.

With respect to question one, it is not necessary for a prosecution under Section 33(2) to prove actual harm to fish or fish habitat. It is only to prove that the area was frequented by fish. I have reviewed all the evidence respecting this, including the testimony of Fisheries Officer Webb, Mr. Langer and Mr. Peterson, and all agree that in November adult Chum Salmon and Coho were in the river above and below the Cewe property. I am satisfied after considering all the evidence that the waters were frequented by fish and find this as a fact.

With respect to whether or not the material deposited at the delta and from the sample in as Exhibit 5 is a deleterious substance.

The Crown's principal witness was Mr. Langer, a biologist, and at present the head of Habitat Management for the Fraser River, Northern B.C. and the Yukon. He has many years of experience, some twenty-three years, and has studied extensively sediment and its effects on fish and fish habitat. He states that the sample he took, Exhibit 5, at the edge of the delta forming in the river had readings of seventy-eight thousand, one hundred milligrams per litre of N.F.R. and a turbidity reading of thirty-five thousand, one hundred F.T.U. And his opinion is that at that point is a deleterious substance.

The Defence witness, Mr. Peterson, is also a biologist with many qualifications, and he also testifies that the delta reading of seventy-eight thousand, one hundred milligram litres would be harmful to fish.

I am satisfied after considering all the evidence on this point that the material from the outfall of the culvert to the river at the point Exhibit 5 was taken by Mr. Langer with N.F.R. readings of seventy-eight thousand, one hundred, and F.T.U. readings of thirty-five thousand, one hundred, was in fact a deleterious substance and I so find as a fact.

I turn now to the next question, is the material so deposited from the sediment stock piles on Cewe company property.

Crown wants the inference drawn based on Mr. Langer's evidence that the sediment in Exhibit 5, the sample taken at the edge of the delta, was entirely from the stock piles along Pipeline Road belonging to the company. The stock piles in question south of the gravel wash plant and adjacent to the west ditch of the road were on land owned or leased by the company.

Again the Crown's evidence is from Mr. Langer. His evidence is he noted a delta forming at the outfall of the culvert into the river. He returned to the area. From the culvert area it was two hundred metres south to the gravel wash plant. He then walked fifty metres to the south. I should perhaps mention that my transcript said fifteen, but in your submissions, Mr. Cliffe, it's fifty, and I'm looking at my notes, it's fifteen, so -- fifty, so I'm assuming it is in fact fifty metres.

MR. REYNOLDS

To the south.

HOLMES, Prov. Ct. J.

Yes, to the south, as opposed to fifteen, one, five.

MR. CLIFFE

Yes, five, o, Your Honour.

HOLMES, Prov. Ct. J.

Yes, okay. Examining the sediment stock piles, he noted rivulets coming down the stock piles, flowing through the berm and into the ditch. Then it flowed north in the ditch to the culvert.

He noted a similar flow of silt laden water from the opposite direction, that is north of the culvert.

He then walked one hundred metres north along Pipeline Road along the ditch and noted a series of flows. Two or three were flowing from the sediment stock piles into the ditch and proceeding south along the ditch to the culvert and ultimately to the Coquitlam River. At the intake of the culvert he noted the two streams, one from the north and one from the south, meet and go through the culvert.

Vegetation was on the old berm or piles, and the piles through which the material was flowing were largely unvegetated.

Mr. Langer's evidence is that visually the material from the berm was the same as that coming through the culvert, out to the delta forming in the river. He states that he was at the sample point ten minutes to take the sample, and the delta was forming while he was there.

His evidence is that he doesn't know when it began, but that it was not the type to have persisted for a long period in the velocity conditions existing in the river. His evidence is that he does not know when the delta went. His estimate of the flow from the culvert was point three to point five cubic feet per second. This was an estimate only, not an actual measurement because he did not wish to insert his scientific instrument in such sediment laden waters.

Mr. Langer defines the sediment he is speaking of as coarse sands, small pebbles down to the clays, and including the clays, and he states it is these that can have a detrimental effect on fish and fish habitat.

He also stated Exhibit 5 to contain sediment ranging from clays to fine sand and that it was inorganic. This was not disputed.

He also testified that the sediment stock piles along Pipeline Road were mainly sand, but also found gravel, fine sand, silt and clay. That the piles were a product of the gravel pit operation.

Other evidence called by the Defence states that these piles were marketable material.

Mr. Langer's testimony is that there was nothing either on the stock piles themselves or in the west ditch to prevent the flowing sediment from getting to the culvert.

His testimony further is that on the date in question, November the 15th, 1985, he entered the Defendant company's gravel wash plant and walked up on the sediment stock piles and noted rivulets of water containing sediment flowing off the piles and into the gravel wash plant area.

His testimony further is that he did, one, not take an upstream or downstream control reading pertaining to this particular discharge because he was short of sample bottles and late for another engagement. Two, did not sample the ditch before it enters the culvert. Three, did not sample the ditch below the source of the water off the berm and into the ditch. Four, did not sample the ditch where the water begins to flow north. Five, did not sample the ditch north of the entrance to the culvert. Six, did not sample the berm itself. Seven, did not sample the material coming from the berm. Eight, did not climb the berm on November the 15th, 1985.

The Defence called Mr. McLaren, a professional engineer, specializing in hydrology. He has a Master of Science and has been engaged in his profession in Canada, Australia and the United Kingdom. He has worked for the Federal Government in Canada, and also for the Government of Australia. He is presently in a senior position with a respected firm of consulting engineers.

His evidence is that the manner of taking samples is one which hydrologists pay particular attention to. His testimony is that he took the numbers, dimensions and flow as described by Mr. Langer in his evidence. He looked back at what Mr. Langer says was the source of the sediment. He found no evidence of the removal of material from the sediment stock piles which would be expected if the sample, Exhibit 5, that Mr. Langer took, was in fact a true sample that represents the flow from the accused company's property.

Mr. McLaren is also critical of the sampling stations used by Mr. Langer as set out in Exhibit 11 which was the map completed by Mr. Langer setting out them as he used on November the 15th, 1985. One of his criticisms is that there was no accounting for the effect of intervening streams.

In March of 1987 samples of the stock piles and the roadside were taken under his direction. These samples were taken at that date because of the delay first of all in notifying the company of the pending charges which was in fact not done until the spring of 1986, and the subsequent delay in providing particulars to the Defence. These particulars were not given until November or December of 1986.

Mr. McLaren's evidence is he compared Exhibit 5 with the roadside samples and the stock pile samples, Exhibits 87 and 88 respectively, and he finds a much greater similarity between Exhibit 5 and the roadside samples than between Exhibit 5 and the stock pile samples. His evidence is that the difference between Exhibit 5 and the stock pile samples is significant at page 95 of the transcript dated July the 15th, 1987, lines 18, 19 and 20 when asked in chief what his opinion was with respect to the material in Exhibit 5 coming from the washed sand piles. His answer was, no, it's not similar to the washed sand pile material at all. It comes from elsewhere, quite possibly the road shoulder.

Mr. McLaren's evidence further is that he couldn't determine the exact amount of Exhibit 5 which would be from the stock pile, but it reasonably could be as low as a few per cent and this is consistent with ordinary natural erosion.

Mr. Andrews was called for the Defence. He was the Director of Environmental Protection and the Cewe Company liaison with the different governmental authorities. He's held this position since the fall of 1980.

His evidence is that Exhibit 59 shows the ditch and the culvert in question. He states that the material in the ditch could have come from one, the roadside of the ditch. The shoulder slopes to the ditch and makes channels where the rivulets go. Two, the ditch further to the south from where Mr. Langer was. Three, the banks of the Cewe property.

His evidence is there are many trucks driving on Pipeline Road and have been since he began working with the company. He states about a hundred and sixty tandem trucks every working day, an average of one every three minutes, and that there is seepage of material out of the tailgate of the trucks.

His evidence further is that the shoulder of the road is similar to the condition it was in 1980. That the company has not placed any fresh material on the site of the bank since 1980. That the condition of the berm was the same as it was on November the 15th, 1985, except that the vegetation is higher.

The ditch, according to Mr. Andrews' testimony, and it is not disputed, is on the municipal road allowance, and the municipality infrequently maintains the ditch. The accused company is not to clean the ditch because of a very old and fragile water conduit and the gas main installed close to the shoulder.

Mr. Andrews states the culvert is very old and operational, and it sometimes plugs because of rainfall. If the company notices water flowing across the road the company unplugs the culvert. If Mr. Langer's evidence is correct as to the large amount of erosion from the stock piles taking place on the 15th of November 1985, surely that would have been noted by Mr. McLaren.

The Crown's evidence is Mr. Langer's testimony that visually he noted the material from the berm as being the same as that from the culvert and he provides figures from the sample and the flow and he does not take any other samples relevant to the stock piles.

The evidence of Mr. McLaren is that he did not notice amounts of erosion based on Mr. Langer's figures removed from the stock piles. His opinion re the dissimilarities between Exhibit 5 and the sediment piles he sampled later. His evidence that he could not ascertain the exact amount of Exhibit 5 as coming from the stock piles but it reasonably could be as low as a few per cent, and that this is consistent with ordinary natural erosion.

In addition I have the evidence of Mr. Andrews that the material in the ditch along Pipeline Road could have come farther to the south than noted by Mr. Langer, or could have come from the roadside of the ditch, and that the shoulder of the road is similar in condition as to what it was in 1980.

After again considering all the evidence on this point, I am not prepared to assume that the matter coming out of the culvert and sampled by Mr. Langer was coming only from the stock piles. I have great doubt on this matter and I do not find as a fact that the only source was the Cewe piles.

I turn now to the question of due diligence.

It is common ground that the charge is a strict liability offence and that the defence of due diligence is available to the accused company.

Mr. Andrews was originally approached in the fall of 1980 by Mr. Cewe following a previous prosecution of the company by the Ministry of the Environment enforcing the *Fisheries Act*. At that time complaints about the mine were still in existence, and the mine was about to be shut down again. He was to try and find out what was required by all the different ministries and then to attempt to bring the accused company into compliance.

Mr. Andrews further testified he is the accused company's Director of Environment Protection and its liaison with different government agencies. He is not a professional engineer, a geologist, or a biologist. He does have considerable practical experience in dealing with various ministries, and his evidence is that he had a free hand as to engaging experts he needed to consult for advice and that no financial restraints were placed on him.

He states the stock piles in question were in place when he arrived, and that there is no substantial change in their size although they were pulled back from the ditch.

The situation faced by Mr. Andrews when originally retained was a disaster. The company had been prosecuted, found guilty, and fined under the *Fisheries Act*. The Ministry of Environment had closed the mine. The Ministry of Mines had issued a closure. The pollution problem had not been solved.

The company, under Mr. Andrews' direction, began a river testing program to determine what the situation in the river really was.

The Ministry of Mines, shortly after Mr. Andrews began working, wanted a mining plan for the area within one week. A previous mining plan had been presented but was rejected.

As a result of concerns of all parties involved the Pipeline Road Mining Committee was set up with a view to co-ordinating all the different ministries' orders and requests and to develop plans to bring the silt under control re everything in the watershed.

The committee was composed of the Ministry of the Environment, Mr. Hehn was the representative. The Ministry of Mines, Mr. Dudas was the representative. The Ministry of Fish and Oceans, Mr. Bell-Irving and Mr. Hamilton being the representatives. It commenced in the fall of 1980. It met an average of once a month for four years. Mr. Andrews represented the company, together with professional engineers also for the company as needed.

Mr. Andrews testified about the committee as did Mr. Hehn who has been the Regional Director for the Ministry of the Environment since 1980. Mr. Hehn was the person responsible for the previous prosecution against the company.

The committee decided the first order of business was to effect an abatement of the silt into the river and this involved a company retaining a professional engineering firm to develop plans to bring the silt under control. The next step was to develop a comprehensive catchment system to control water to the river. The next step was to decide what to do after the waters were contained, and eventually a gravity fed settling pond was decided upon.

The committee decided the company should undertake nothing the committee did not order.

The Sir William Halcrow plan was received by the committee, the final report in June of 1981. The main features were one, the diversion around the mine. Two, the collection system. Three, the settling pond system. Four, the creeks were to be riprapped to slow erosion. The plan identified sixty per cent of the water as coming from Pit M, as well as a triangular portion of land above the face. Neither of these parcels were owned by the company.

The closed circuit system was established in 1981. Mr. Andrews testified he benched the stock piles in question in 1981 along the road and no complaint was ever received about the work and no complaint was received about the portion left untouched.

The hydrological study ordered from Western Canada Hydraulics was received and no mention let alone criticism was made of the area along the road.

The committee instructed the company to bring the water from Pit M under control. The company was unwilling to do so unless they were assured no blame would attach to them as owner. They agree to purchase Pit M, and it was purchased for the price of six hundred and twenty-five thousand, and it was purchased in contemplation of leasing the triangular portion of land.

The company completed the dam and creek diversion as recommended before the winter of 1981. The settling ponds were completely joined. The settling ponds were enlarged as it could be done. The creeks C and 2B were rip-rapped.

The Halcrow Plan recommended the removal of the berms along the road when reclamation could begin. The material in the meantime could not be moved and as a result the berms could not be removed.

The river testing begun by Mr. Andrews was subsequently in 1982 given to Western Canada Hydraulics. The instructions given to the engineers were that the testing was to be done without prior knowledge to the company or to Mr. Andrews, and copies of the results sent to the Department of Fisheries and Oceans, Environment and Mines. The purpose being to show the condition of the river above and below the company property.

All departments were notified that this was going to be done and any suggestions they had as to the sites or the method of testing would be welcomed. None in fact were received by Mr. Andrews or Western Canada Hydraulics. He further states he has never received any communication from any department or official challenging the results.

There were two problems the committee could not solve. Benching and flocculation.

After purchasing Pit M the company applied for the lease of the triangular parcel. Another report was needed and this was finally received in late 1986 after which time the company recveived a lease for fifteen months to do the needed work, which was then commenced.

With respect to maintenance, the continuing erosion and filling up of the settling ponds were a serious problem. A Toyo Pump was purchased and flown in from Japan. It was first used in 1984.

Mr. Hehn confirms the ponds were not maintained in 1983, '84 and part of '85, but he goes on to state he wasn't certain even with the pump that the sloughing off the faces could be controlled. Several letters were sent by him to the company insisting the ponds be maintained in very strong language. He further states that by August of 1985 the ponds were cleaned and he was satisfied. He also states that in the fall of 1985 his department received a number of complaints, that all were investigated, that he felt the company and his ministry had good co-operation.

The Pipeline Road Mining Committee disbanded in December of 1984. The Fisheries representative at that time, Mr. Bell-Irving, asked Mr. Hehn to keep an eye on things for him and to keep the Fisheries informed if need be. This seemed to be a reasonable request in my view of the Ministry of Environment pursuing the previous prosecution in the late '70's on behalf of the Fisheries Department.

Mr. Hehn's evidence further is that his ministry still inspected the mine once or twice a month, and he testified he took personal responsibility to make sure that work promised by the company were undertaken. He made his position clear that if the company did not co-operate the mine would be closed.

The company continued to work with each ministry on an individual basis. Mr. Andrews' evidence is he was quite willing to work with the Department of Fisheries and Oceans, and further that he never received any complaints or communications from them.

On November the 2nd, 1985 a massive mud slide occurred on the mine site. Mr. Hehn and the Ministry of Mines were notified, as were the company engineers, Hardy and Associates.

The company was able, by working day and night, to eventually contain the three hundred to four hundred thousand cubic feet of mud, and in the process a high berm was constructed and part of the gravel wash plant was buried. It was out of commission for some three months.

The Ministry of Mines and of Environment both expressed approval as to the work that was undertaken.

On November 6th a Fisheries officer was on site. Mr. Andrews explained the situation and no comments were made about the berm along the road.

Mr. Andrews testified that no changes in maintenance were undertaken after November the 15th, 1985. No complaints were received after he did the work as requested by Mines in January of '85 and it was not mentioned by Mines again. His letters were copied to all concerned parties, including Department of Fisheries and Oceans. His evidence is also clear he never received a complaint from Fisheries and Oceans about the stock piles Mr. Langer testified about.

Mr. Hehn's evidence is clear his department was not concerned with the road bank piles. It is also clear his department, although they received many complaints, never received any complaints about the road bank.

Mr. Hehn and Mr. Andrews testified at length about the fact that the committee, although it was concerned with pollution all along Pipeline Road, did not identify or consider any problem regarding the ditch along Pipeline Road.

The Halcrow Report noted that the ditches were full and must be cleaned and Mr. Hehn states that even so if it was a problem it was so minute a problem of any question that was involved that there was no consideration given for it at all.

The District of Coquitlam wanted the ditch left out of any discussion by the committee because of the water and gas main and they did not want the company in the ditch.

Mr. Andrews testified that the piles were discussed in a minor way by the committee, that Mines wanted the piles disposed of, but the company could not comply because of the size of the piles, roughly two million tons of sand, and there was nowhere to put it or dispose of the sand.

Mr. Andrews testified he received a report from the Ministry of Mines in January of '85, that one of the stock piles was intruding onto municipal property. He testified he attended to this by pushing the piles back so they wouldn't intrude on the road.

Mr. Andrews also states he received two reports per month from Mines and if the items are not complied with the department follows up with the same item on the next report.

He states after doing the work in January the subject of the road piles did not come up again, and further that after January 1985 no instructions were received from any agency re the berms or the condition of the berms or gullys.

Mr. Hehn testified that the company did everything his department asked them to.

The company spent the following amounts of money pursuant to the directions of the committee. Two hundred thousand for the initial implementation of the early stages of the Halcrow Report. A hundred and twelve thousand in June 1981 for the Western Canada Hydraulics Report. A hundred and ten thousand in June of 1981 for the Halcrow studies and reports. Six hundred and twenty-five thousand for Pit M. A hundred and twenty thousand for the Toyo Pump and the dredging pipes. Eighty thousand for dredging and maintenance. A total of about one point two to one point five million spent on environmental protection and implementing programs.

This resulted in a reduction of the material going into the river in the range of ninety per cent.

The Crown states that the company did not exercise all reasonable care to deal with the sediment control problems because the efforts were concentrated on controlling the erosion of Crown lands. Mr. Andrews was in control and was not an employee. That Mr. Andrews had difficulty with the company management re implementing programs and maintaining schedules. That Mr. Cewe argued about the expenditures for environmental concerns. That the company was not diligent about cleaning out the settling ponds. That the company should have hired a qualified individual on a full-time basis.

The company hired Mr. Andrews and gave him the financial wherewithal to have qualified, specialized professional help whenever needed. His evidence is he was on the site when needed and he was accepted by the Pipeline Road Mining Committee as the company's representative and I find this objection without merit.

The work done by the company was done pursuant to the direction of the committee.

The question of difficulty with the plant superintendent and the general manager had been resolved before this event happened, and apparently to the satisfaction of Mr. Hehn.

It is not surprising Mr. Andrews had arguments with Mr. Cewe about the money. With such large expenditures of money it would be surprising indeed if no arguing took place and monies just spent with no regard to economic or financial recovery.

I make the following findings of fact. All work done by the company from January 1981 to December 1984 was done pursuant to the directions of the Pipeline Road Mining Committee. That the committee did not identify a problem with the berm along the ditch. That regular inspections or testing of the river was done. That results of these tests were sent to every ministry concerned. That no complaints, requests or communications were received from the Department of Fisheries and Oceans re the stock piles along Pipeline Road. That in January of 1985 a request was received from the Department of Mines to do some work, and it was done, and no complaint was received. That the company did all the Ministry of Environment directed them to do. That the company spent a minimum of one point two million on environmental protection and implementing programs. That a reduction of ninety per cent was effected of all the material going into the river. That all of the concerns the committee was engaged in during its lifetime, the stock piles, if mentioned at all, did not cause any concern to the committee.

I have read and considered all cases presented by both the Crown and the Defence.

The standard of care required to meet the evidentiary burden is a high one and I must decide on a balance of probability whether or not this standard has been met.

The company in 1980 did not know how to solve the problem, or even what it was or how extensive it was. And following that in my view they took all reasonable steps to contain and solve the problem.

Further in my view they did everything humanly possible and more to avoid this sort of catastrophe.

There will be on this ground an aquittal registered in regard to the Information since the court is satisfied the defence of due diligence has been established.

Mr. Cliffe and Mr. Reynolds, on a personal note, may I compliment you on your conduct during the trial. Rarely indeed has it been my experience where such expertise and courtesy to the witnesses and to the Court has been experienced in recent times. It has been a pleasure having your appear before me, and I thank you.

DISTRICT COURT OF NEWFOUNDLAND

R. v. KELSEY

BARTLETT, Dist. Ct. J. St. John's, August 28, 1985

***Fisheries Act*, R.S.C. 1970, c.F-14 as amended - Appeal allowed from acquittal of charge under section 31(1), unlawfully carrying on any work or undertaking resulting in the harmful alteration, disruption or destruction of fish habitat - Central issue - Whether there was destruction of fish habitat, not whether the destruction of fish habitat will result in the destruction of fish - Accused granted conditional discharge and placed on one year probation.**

The Crown appealed the acquittal of the respondent from a charge under section 31(1) of the *Fisheries Act*, R.S.C. 1970, c.F-14 as amended, unlawfully carrying on any work or undertaking resulting in the harmful alteration, disruption or destruction of fish habitat. The grounds for appeal were:

1. That the trial judge erred in law in acquitting the accused on the basis that there was evidence to show a harmful activity.
2. That the acquittal was unjustified having regard to the facts as established at trial.
3. That the acquittal was erroneous in law and cannot be supported by the evidence.

The respondent submitted that the information was defective in that the respondent had admitted to installation of the culverts in the month of August, while the first complaint to fishery officials was made on the first day of October. The respondent contended that the information did not disclose an offence known to law, since the charge alleged that the respondent destroyed fish habitat, implying intent and *mens rea* which is totally foreign to that section of the Act. The respondent also submitted that the doctrine of *de minimus non curatex* should be applied in this case.

Held, the Appeal was allowed. The accused was granted a conditional discharge and was placed on probation for a period of one year.

The Court held that the trial judge made a finding that there was no evidence of diminution or destruction of fish population rather than a finding of fact that it was not shown that the culvert is a destructive environment for fish or is uninhabitable by fish. The question whether the destruction of fish habitat will result in the destruction of fish is not one which the Court is required to determine. That there will be an adverse effect on the fish population caused by the destruction of fish habitat must be presupposed by virtue of the legislation prohibiting the destruction of the habitat.

The Court found that the information was sworn within the prescribed period of limitation referred to in section 732 sub 4(a) of the *Criminal Code*. Further, the respondent had not been prejudiced in the preparation of his defence as a result of any such variation in the language used in the information.

Referring to expert witness's testimony, the Court found that the respondents submission regarding the *de minimus* doctrine was without merit. The destruction of the environment is a gradual process effected by cumulative acts and each offender must bear equal responsibility for the final result.

Chesley F. Crosbie, for the Crown (Appellant).
Donald G. Sword, for the Accused (Respondent).

BARTLETT, Dist. Ct. J.

This is an appeal from the acquittal of the Respondent entered by Judge Gordon Seabright of the Provincial Court of Newfoundland sitting at St. John's on the 16th of June 1983.

The offence of which the Respondent was acquitted was that he did, between the 1st day of October A.D. 1982 and the 16th day of November A.D. 1982, destroy the fish habitat, to wit by installing metal culverts in a tributary of Leary's Brook in the City of St. John's, Province of Newfoundland, contrary to sub section (1) of Section 31 of the Fisheries Act R.S.C 1970 C.F. 14, as amended, thereby committing an offence contrary to section 31(3) of the said *Fisheries Act.*

The appeal is from the acquittal on the grounds that:

(a) The learned trial Judge erred in Law in acquitting the accused on the basis that there was no evidence to show a harmful activity or that the destruction of the said fish habitat was harmful.

(b) That the said acquittal was unjustified having regard to the facts as established at trial.

(c) That the said acquittal was erroneous in law and cannot be supported by the evidence.

(d) Such further and other grounds as may be raised by the Appellant in argument.

The judgment of the trial Judge as set forth in the transcript reads as follows:

> Mr. Kelsey, in this matter you are charged that you did between the 1st day of October, 1982, and the 16th day of November, 1982, destroy fish habitat, to wit, by installing metal culverts in a tributary of Leary's Brook in the City of St. John's, province of Newfoundland, contrary to subsections (1) of Section 31 of the *Fisheries Act* R.S.C. 1970, c. C-14, as amended, thereby committing an offence contrary to Section 31(3)(a) of the said *Fisheries Act.*

In the Fisheries Act under Section 31, subsection 5, it says,

> "For the purpose of this section and sections 33, 33.1 and 33.2, "fish habitat/means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes."

That is the position that the Crown puts before me. The situation is that I think we can without any doubt find the following matters as facts.

One is that Leary's Brook begins somewhere in the hills of St. John's and winds its way through the City until it arrives at Rennies River and other watersheds in the City of St. John's. I think that is a natural fact.

That due to construction (and mainly here I am thinking here of the construction of buildings and construction of the Kenmount Road) that the sight of the brook has been changed and has been altered. In fact, you, Mr. Kelsey, did alter the property by putting in the culverts. There is no doubt that I think that the definition of fish habitat that Leary's brook certainly qualifies as a fish habitat.

The pivotal words, in my view, in this particular matter is that you have to destroy a fish habitat or that you have to alter it and harm it in such a way that this would create the offence.

There is evidence before this court that Leary's Brook is certainly a fish habitat, and is probably one of the largest fish habitats or fish growing areas probably in the entire world if the sequence of the events that the people have put before us from the Department of Fisheries is true. Because of the fact that the ordinary level of fish growth is something like six, and there is something like sixty-six in Leary's Brook. The situation is that that evidence is before use. There is also evidence before us that the culverts in this particular area that there are fish on one side and the other. What is lacking in this matter, so far as I am concerned, is that it has to be shown that what you have done and what has happened on the Kenmount Road, or that particular area, Leary's Brook, that follows by Kenmount Road down through the area and into Rennies River, was harmful. I think this is where the evidence in this matter breaks downs.

There is evidence to show that there is a great deal of fish activity. There is no evidence to show that since that culvert was put in that there was any change or any harmful effect by having that culvert put in.

It is in my view that the evidence must support the contention that there has been a harmful alteration. I think that is where the matter lacks itself completely. In that particular matter, Mr. Kelsey, I am going to dismiss the charge against you."

A synopsis of the evidence as set forth in the Appellant's brief is as follows:

1. Bertram R. Parsons, A Fishery Officer, Department of Fisheries and Oceans, Conservation and Protection Branch of Resources Management testified that on October 1, 1982, he received a complaint of culverts being installed in a tributary of Leary's Brook, Kenmount Road. He visited the property, which was that of the accused and found that two 20,000 gallon oil tanks installed in the river running through this property and one lying on the bank which had been eroded or dislocated. On October 4, 1982 he returned to the property, noted the tanks to be in the same place and spoke to the accused at his business office nearby. Mr. Kelsey was informed of the violation of the Fisheries Act, and was requested to remove the tanks under Department of Fisheries supervision. The accused informed him that he intended to beautify his property and would not remove the tanks.
   Reference: Transcript pp. 1-7 p. 12

2. Mr. Parsons also testified that he made several more views of the property and the tanks were not removed. On an unknown date approximately two weeks later he again spoke to the accused and asked him to remove the tanks to which Mr. Kelsey indicated that he would contact the department to see what arrangements could be made.
   Reference: Transcript pp. 7-8

3. Mr. Parsons further testified that he made a report and was visited by Gary Kelland and Rick McCuvvin of the Fish Habitat Department who visited Mr. Kelsey and on October 19, Mr. Kelsey was sent a registered letter advising of the infraction and to remove the tanks by November 5, 1982, a copy of which was entered as B.P. no. 1.
   Reference: Transcript pp. 8-10

4. Mr. Parsons then testified that on November 16, he attended an electrofishing procedure at the Kelsey property and then on November 18, he delivered a summons to Mr. Kelsey.
   Reference: Transcript pp. 10-11

5. On cross-examination by counsel for the defence, Mr. Parsons indicated that the river was ten feet wide at the Kelsey property and that he did not see any work being done. On re-direct, Mr. Parsons testified that Mr. Kelsey had admitted ordering the work.
   Reference: The Transcript, p. 12-15

6. Timothy Anderson, Program Co-ordinator with Habitat Protection, Department of Fisheries (Federal) testified that in late September he received a telephone complaint from District Office, St. John's of unauthorized culverts in Kemount Road area. Mr. Anderson advised them to investigate and report back. On October 18, Mr. Anderson together with Gary Kelland and Richard McCuvving visited the Kelsey property, observed the culverts and noted the evidence of construction. He informed Mr. Kelsey of the need to obtain authorization to which Mr. Kelsey replied that he owned the land and had a right to culvert it. Mr. Anderson informed Mr. Kelsey that he would go to Court and requested the District Office to send a formal registered warning letter to Mr. Kelsey.
   Reference: The Transcript - pp. 15-17, pp. 21-23

7. Mr. Anderson also outlined the Department's authorization system for works affecting fish habitat (sic) and the publicity given to it, entering a newspaper advertisement as T.A. no. 1, a press release as T.A. no. 2 and a number of newspaper items as T.A. no. 3.
   Reference: The Transcript pp. 17-21

8. Upon cross-examination Mr. Anderson identified application forms for authorization.
   Reference: The Transcript pp. 23-26

9. Mr. Anderson then went on to explain his interpretation of the effect of the culvert on the fish habitat and outlined his prior acquaintance with Mr. Kelsey. He then defended the decision to order removal of the culverts. Upon

re-direct examination he indicated that within the previous two weeks he had driven by the Kelsey property and had noted that the culverts were still present.

Reference: The Transcript pp. 26-35

10. Richard McCuvvin, Habitat Protection Technician, Department of Fisheries and Oceans was declared an expert witness. He testified that on October 18, 1982 he visited the Kelsey Property with Fisheries Officers Kelland and Anderson and spoke with Mr. Kelsey. He objected to the offending items being referred to as culverts as they were oil tanks with the ends cut off being used as culverts. He noted the signs of excavation and that there had been quite a lot of bank damage.

    Reference: The Transcript pp. 35-39

11. Mr. McCuvvin also testified that on November 16, 1982 he again visited the Kelsey property to electrofish the river. Photographs were taken at this time and entered as R.M. no. 1.

    He explained electrofishing as a technique which stuns the fish momentarily with an electrical impulse so that they can be taken out and weighed. Six brown trout were found in a plunge pool downstream from the culvert and upstream were found three fish which indicated to Mr. McCuvvin that there was a fairly healthy trout population in Leary's Brook. Three large trout were found downstream from the Kelsey property. Mr. McCuvvin's opinion was that the section of the stream examined was highly productive. The installation of the culverts resulted in the fish being unable to use the water, the stream bank being damaged through mineral soil exposure which lead to slumping of the stream banks and deposition of mineral soils into the stream bottom used to harbour aquatic insects. His opinion was that the habitat was destroyed.

    Reference: The Transcript pp. 39-49

12. Mr. McCuvvin testified further that Leary's Brook is a part of the Renny's (SIC) Mill System which is 2.5 times more productive than any river tested. He explained how brown trout feed on insects when small, and small fish when mature, and that good habitat is characterized by overhanging banks which provide cover and insect drop. He also stated that, left on their own, destroyed habitats can recover themselves over time (ten, fifteen to twenty years) but that the Kelsey property culverted area could be restored and suggested a way to effect this.

    Reference: The Transcript pp. 49-54

13. Upon cross-examination Mr. McCuvvin was questioned as to the time-table of his proposed restoration of Leary's Brook at the Kelsey Property. He was then questioned as to whether this section was once marsh and he indicated that it may have been but that marshes are also productive of fish. He was also questioned as to natural erosion at this point in the river and stated that the tall grasses on the banks would indicate very stable banks.

    Reference: The Transcript pp. 54-62

14. He was then questioned as to the portions of the stream already underground and replied that large areas of Leary's Brook are undisturbed and it is these areas which contribute to the brook's high productivity and that if the

alterations to the system go unchecked it will "spell the death knell of the productivity of the system". He then outlined circumstances where a river may be culverted and indicated that this was not a suitable stream to be culverted.
Reference: The Transcript pp. 62-65

15. He then went on to state that a long culverted area would have no fish in it and that if fish are found at either end of this system it is because there are two separate fish populations. In the particular instance of that portion of Leary's Brook flowing under Dodge City he could not say whether fish travelled through that culvert but that it was his opinion that the area was too long to travel through, although he did no testing.
Reference: The Transcript pp. 65-70

16. On re-direct examination by the Crown he explained the laws of physics governing the flow of water and how this flow speed is increased when the water is channelled through a culvert.
Reference: The Transcript pp. 70-71

17. The final witness for the Crown was Dr. R. John Gibson, Fisheries Scientists, Fisheries Centre, White Hills, St. John's, who was declared an expert witness by the court in salmonid ecology.
Reference: The Transcript pp. 74-77

18. Dr. Gibson testified that in April 1981 he participated in a study of Ken Brook, also know as Upper Leary's Brook which showed a surprisingly high fish population. Further study show that this brook has an exceptionally high production of trout.
Reference: The Transcript pp. 77-80

19. He further testified that on the previous Sunday he observed that section of the stream where it runs through the Kelsey property and noted that it had been channelized and had cylinders being used as culverts in the stream.
Reference: The Transcript pp. 80-81

20. Dr. Gibson was then questioned as to what would be a good habitat for trout. He replied that riffles, pools with bank cover, depth distribution and repairing vegetation; a diversity of habitat. He found fewer fish in channelized areas than in other areas. He testified that the stream in question is exceptionally good fish habitat, and that it is regarded as an important nursery stream.
Reference: The Transcript pp. 81-84

21. Dr. Gibson then described the destruction to the system in the section where the cylinders had been placed in Mr. Kelsey's property and how the system could be restored.
Reference: The Transcript pp. 84-85

22. Upon cross-examination Dr. Gibson specified the actual portions of Ken Brook (or Upper Leary's Brook) examined - one point upstream and three downstream from the Kelsey Property. He was asked if the trout studied were one community and replied that they were genetically one stock but that is is now

known what is the extent of movement up river. He also indicated that fish can move through culverts if these culverts are correctly installed.
Reference: The Transcript pp. 85-94

23. He went on to describe the migratory patterns of the fish and indicated that the measurement of fish in a river is the carrying capacity of that river: that is what would be found at any one time.
Reference: The Transcript pp. 94-98

24. He further described that if a habitat is destroyed, the fish would go elsewhere and either they would die or other fish would die as they would exceed the carrying capacity of the river would be exceeded. There have been no final figures calculated as the carrying capacity of the subject river and Dr. Gibson could therefore not give the court an exact number of fish displaced by Mr. Kelsey's culverts.
Reference: The Transcript pp. 98-101

25. Dr. Gibson then described a baffling system possible to lessen the obstruction provided by a culvert, but this would not affect displacement.
Reference: The Transcript pp. 101-102

26. Dr. Gibson finally stated that he had done no studies of the underground portions of Leary's Brook and described electrofishing.
Reference: The Transcript pp. 102-103

27. Upon redirect examination Dr. Gibson explained the necessity for streams in the rearing of trout.
Reference: The Transcript pp. 103-105

28. The defence presented one witness, the accused, Douglas Kelsey.
Reference: The Transcript pp. 106

29. He testified that he has lived on Kenmount Road for fifty-five years where the Kelsey family owns several hundred acres of land on the north side of the road.

He testified that as a boy he fished in Leary's Brook and that the brook has changed considerably since then. He stated that the river was made as it is by them (the Kelsey family) but after 1955-60 the river has been no longer useful to water cattle and that in the months of July and August a sewage odour comes from the river. He wished to cover in the river fifteen years ago and have a lawn.
Reference: The Transcript pp. 106-110

30. He further testified that he is a charter member of the The Rod and Gun Club and is a Conservation Officer, recognized by Remington.
Reference: The Transcript pp. 110-111

31. He also testified that about 1964 a culvert was put in under his driveway at which time there was no law against it.
Reference: The Transcript pp. 112

32. He further testified that Kenmount Road has recently been industrialized and land values have increased. In 1981 he acquired oil tanks and in 1982 he had the ends cut out of them. Two tanks were put in place in the latter part of August ahead of the spawning season and a third was put in the garden. He stated that a Fisheries Officer in early October asked him why he had not got this tank into the river "Out of sight, out of mind". This was the officer who wrote him. He also stated that the Fisheries Officers visited him on Mondays, his busy day and this explains why he was not polite to them.
Reference: The Transcript p. 112-115 p. 116

33. Mr. Kelsey then identified a letter which he had received together with an application for a permit which he did not fill out as he did not wish to remove the tanks and to disturb the river bed at spawning. The letter was a copy of BP no. 1 and was entered as D.K. no. 1.
Reference: The Transcript pp. 115-116

34. He further testified that four inches were left on both ends of the tanks as baffles and that the riverbed has returned to normal.
Reference: The Transcript pp. 116-117

35. Mr. Kelsey then identified a load of gravel in photograph No. 1 as a runway for a front end loader, placed there without his prior knowledge.
Reference: The Transcript p. 117

36. He also testified that he saw no harm in placing the culverts as there were others and because he noted fish under bridges. He also stated that he was having an erosion problem where the river came out of the Dodge City property.
Reference: The Transcript pp. 118-120

37. He identified an Evening Telegram article "No One Charged" which was published 3 months after his culverts were placed (entered as D.K. no. 2). This was the first time he was aware of the regulations.
Reference: The Transcript p. 120

38. He further testified that the river runs in front of, and not behind the Jade Gardens Restaurant.
Reference: The Transcript p. 121

Counsel for the Respondent submitted that the Information was defective on two counts; firstly that: the Respondent admitted that he had installed the culverts in the month of August whilst the complaint was first made to the Fisheries officials on the 1st day of October.

I note that the Information was sworn to on the 18th day of November - within the period of limitation referred to in Section 732, sub 4 (a) of the *Criminal Code*, which reads as follows:

> "a variance between the Information and the evidence taken on the trial is not material with respect (a) the time when the offence is alleged to have been committed if it is proved that the Information was laid within the prescribed period of limitation."

Accordingly this submission is in my opinion without merit.

The second submission by Counsel for the Respondent with respect to the Information was that the charge as laid does not disclose an offence known to law. Section 31(1) is a strict liability offence section prohibiting certain actions that have a specific result. The charge alleges that the Respondent destroyed fish habitat, using an active verb (destroy) implying intent and mens rea and is totally foreign to that section of the Act; he submitted.

I find no merit in this submission. The Respondent has not been prejudiced in the preparation of his defence as a result of any such variation in the language used. Indeed the issue was not raised at the initial trial.

Whilst I agree that, although the philosophy of the Fisheries Act is one of environment protection, the section under consideration provides for a strict or absolute offence. However the evidence before me discloses no valid defence of due diligence.

Counsel for the Respondent submitted that the doctrine of the *minimus non curat lex* should be applied in this case. With respect, I disagree. In the words of the expert witness Mr. McCuvvin, when commenting on the installation of the culverts, "I am saying that actions like that, that go unchecked, will basically spell the deathknell of the productivity of the system".

The destruction of any environment or ecosystem is indeed a gradual process effected by cumulative acts. Each offender must bear equal responsibility for the final result.

I find this submission to be without merit.

Because of the imprecise language used by the trial Judge it is not immediately apparent what finding he made with respect to the alledged destruction of the fish habitat.

The passage, "it is in my view that the evidence must support the contention that there has been a harmful alteration. I think that is where the matter lacks itself completely", must be read in conjunction with the previous paragraph which reads as follows:

> "There is evidence to show that there is a great deal of fish activity. There is no evidence to show that since the culvert was put in there, that there is any change or any harmful effect by having the culvert put in."

A careful examination of these passages in the judgment, satisfies me that the trial judge made a finding that there is no evidence of diminution or destruction of fish population rather than a finding of fact that it was not shown that the culvert is a destructive environment for fish or is uninhabitable by fish.

In making this finding of law, the trial Judge fell into the error of requiring proof of destruction of the fish and on the proper construction of what Parliament intended.

I do not accept the argument so vigourously and ably put forward by Counsel for the Respondent, that, in order for the Crown to succeed, it must submit scientific studies directed towards this particular culvert, to prove that it was not habitable by fish and that there must be evidence as to the negative effect on the fish in the fish habitat, facts upon which to base the conclusion of the particular case. He suggested that "expert opinions" if not based upon facts in the case are mere speculation.

Proof of destructive effect on the fish would require a fish count taken before and after the installation of the culvert. The practical difficulties of making such a comparison are apparent. In order to ground any action taken pursuant to Section 31(1) of the *Fisheries Act*; every brook and river in the Province would have to be surveyed before a charge was laid for harmful alteration or destruction of the fish habitat as the charge could not be otherwise proved after the damage was done. Clearly this was not the intention of Parliament when it enacted this legislation.

However in this matter the question whether the destruction of fish habitat will result in the destruction of fish is not one which the Court is required to determine. That there will be an adverse effect on the fish population caused by the destruction of the habitat of the fish must be presupposed by virtue of the legislation prohibiting the destruction of the habitat.

In my opinion actual harm to fish can be assumed by the Court on a charge under Section 31(1) of the *Fisheries Act*; once the Crown has proved the destruction of the fish habitat.

This opinion is reinforced by the language used in the immediately preceeding section which reads as follows:

> "30. No person shall destroy fish by any means other than fishing, except as authorized by the Minister or under regulations made by the Governor in Council under this Act."

Thus an inquiry in evidence as to whether it has been proved that the destruction of the habitat has resulted in a destruction of the fish is not an element of the offence.

Section 31(1) of the *Fisheries Act* provides that:

> "No person shall carry on any work or undertaking that results in harmful alteration, disruption or destruction of fish habitat."

Section 31(5) of the same Act states:

> "Fish habitat means spawning grounds, and nursery rearing, food supply and migration areas on which fish depend directly and indirectly in order to carry out their life processes."

Dr. Gibson is a very highly qualified scientist and enjoys a world wide reputation in this field. In his opinion culverts are uninhabitable by fish and are not habitat in the sense that they sustain the life process of fish.

I am persuaded by his evidence and that of Mr. McCuvvin that the installation of the offending culverts by the Respondent, effectively removed from the ecosystem and destroyed as a fish habitat that forty foot portion of the said fish habitat occupied by the two culverts.

Although it is not an element of the offence charged, such destruction cannot but have a harmful effect on the entire ecology of the fish habitat. The word harmful is in my view, implicit in the word destruction.

On the basis of Dr. Gibson's evidence and upon a review and assessment of all the evidence before me, I am of the opinion that the Crown has proved beyond a reasonable doubt that fish habitat has been destroyed as charged by the Information.

Even if I am wrong in reaching the conclusion that the Trial Judge made a finding of law that there is no evidence of diminution or destruction of fish population, a review of all the testimony set forth in the transcript convinces me that he made an error of fact and that it was, in the words of the Supreme Court of Canada, "a palpable and overriding error".

In the result the appeal is allowed.

I direct that the order of the learned Trial Judge to dismiss the charge against the Respondent be set aside.

SENTENCING

Having regard to the circumstances surrounding the commission of this offence, I do not think that the entry of a conviction against Douglas Kelsey, carrying with it a criminal record, is appropriate.

This appears to me to be a proper case for an order of a conditional discharge.

The criteria necessary to ground such an order were stated by Farris, C.J.B.C., in *R. v. Fallofield (1973) 22 C.R.N.S. 342*, as follows:

S. 662.1(1):

(1) The section may be used in respect to any offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.

(2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.

(3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. It if is decided that it is in the best interests of the accused, then that brings the next consideration into operation.

(4) The second condition precedent is that the court must consider that a grant of discharge is not contrary to the public interest.

(5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that is is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.

(6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.

(7) The powers given by s. 662.1 should not be exercised as an alternative to probation or suspended sentence.

(8) Section 662.1 should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of the cases."

The reasoning in Fallofield has been adopted by the Appeal Division of the Supreme Court of Nova Scotia. See *R. v. Doane*, supra; *R. v. Joseph* 46 N.S.R. (2d) 22; 89 A.P.R. 23; *R. v. Martin*, (1974) 8 N.S.R. (2d) 635; and *R. v. Dalton*, (1977) 18 N.S.R. (2d) 555; 20 A.P.R. 555.

The facts of this case meet these criteria.

Accordingly I order that the Respondent, Douglas Kelsey be given a conditional discharge pursuant to the provisions of Section 662(1) of the *Criminal Code*.

I further order that the said Douglas Kelsey be placed on probation for a period of one year.

The conditions upon which the said discharge is directed shall be those deemed to be prescribed in a probation order under the provisions of Section 662(2) namely, that the said Douglas Kelsey shall keep the peace and be of good behaviour and shall appear before the Court when required to do so by the Court. In addition to these statutory conditions the said Douglas Kelsey is ordered to remove the culverts forming the basis of this action, at a time designated by and under the supervision of officials of the Federal Department of Fisheries.

BRITISH COLUMBIA PROVINCIAL COURT

R.v. MACMILLAN BLOEDEL LTD.

REED, Prov. J. Surrey, September 25, 1985

***Fisheries Act*, R.S.C. 1970, c.F-14, as amended - Accused pleads guilty to a charge under Section 33(2), depositing a deleterious substance into water frequented by fish - Dark liquor residue from pulp and paper processing into ocean at Nanaimo.**

Sentencing - Mitigating circumstances - Accused's actions following spill and demonstrated corporate remorse - $10 000.00 fine levied.

The accused pleaded guilty to a charge under section 33(2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, depositing a deleterious substance into water frequented by fish. During operation of the accused's plant in Nanaimo, 30 000 gallons of unprocessed residual solution called "dark liquor" found its way into the ocean waters surrounding the plant. The spill was caused by a technical breakdown of either four or five warning devices installed to alert employees to an overflow in the system. There was also some confusion and lack of response and control capability once the spill was located and clean up and retention were underway. There was no measurable effect on the environment near the plant.

The Court levied a fine of $10 000.00.

The Court relied on a list of mitigating factors as stated by the Territorial Court in its decision, *R. v. Placer Developments Ltd.* and the factors relevant to the nature of the environmental damage outlined by the same Court in its decision, *R. v. United Keno Hill Mines Limited.*

The corporation had tried to comply with government regulations and had tried to specifically remedy the problem. They demonstrated their remorse by extensive construction which was not only going on during the time the events transpired but continued well beyond the day of violation. While the accused is certainly one of the leaders in forestry in the Province and the penalty must reflect that, no profits were realized as a result of the offence, and the matter is restricted to deterrence of pollution.

D.R. Clark, for the Accused.
J. Cliffe for the Crown.

REED, Prov. J.

This matter comes before the court pursuant to the Federal *Fisheries Act* Section 33(2), generally referred to as the "Deposit of Deleterious Substances". The section seems to invoke an absolute prohibition. The defendant company entered a plea of guilty, by its agent and counsel to the charge on the 10th of July, 1985, in Nanaimo, B.C. and the matter was adjourned to Surrey Provincial Court for July 23, 1985. The offence section is 33(5)(b) of the *Fisheries Act* which provides for a fine for a subsequent (second) offence not exceeding $100 000.00.

The charge arose on the 1st of June, 1984, was set for hearing September 9, 1985, and then adjourned to July 8, 1985. On June 5, 1985, the Crown advised the court that a guilty plea would be entered and thereby other matters were scheduled. Both counsel should be respected in calling the matter ahead, as it is only too often that a last minute guilty plea is entered, with the ensuring loss of expensive court time.

The facts are, that on June 1, 1984, the defendant operated a large plant in Nanaimo called Harmac. It produces among other products, pulp, which is manufactured by a chemical process which includes strong bleaches, which are partially recovered by washing and using again. The residual solution is called either light or dark liquor, and it is the latter which is disposed of after processing into the surrounding water under the provisions of a Provincial Pollution Control Permit.

The solution is bio-degradable although it contains a resin which can be lethal to fish and other forms of marine life. It is not harmful to humans if ingested in a secondary manner. In experimental conditions there was a clear demonstration of a fish kill. It is not quite so clear however if the same effect would occur in the ocean. The levels of concentration needed for a large body of salt water was not given to me. It does seem obvious, however, that if sufficient "black liquor" was allowed to escape, with the right tidal conditions, and the presence of fish, there could well be an adverse effect.

A total of 30 000 gallons escaped and found its way into the water surrounding the Harmac plant. While there was some delay and inefficiency in handling the spill it was primarily the breakdown of mechanical warning devices and proves. Four checks failed to function adequately, and another was misinterpreted by an employee reasonably familiar with the process called the "cook", who after the alarm went off, could not find it.

To understand what happened, one has to revert to the nature of the process. The "black liquor", is the residual of a process used to retrieve chemical used in the production of pulp. The first error occurred at 5:35 p.m. when a holding tank for the liquor began to overflow into the adjoining tank. The total spill was 117 000 gallons of which 86 000 gallons was caught in an 8" sewer line where normal effluent would go. As the material overflowed from tank to tank, the high level alarm did not go off as it had been set too high, only a half inch below the tank top. Some alarms did go off but the investigating employee saw nothing at 5:40. At 6:20 another alarm went off in the control room and at 6:25 a "high level alarm" activated, and the maintenance shop millwright saw the liquor overflow on the floor, looked in the ditch and saw the residue. It was a combination of foam and liquor. The foam in particular is hard to stop. At 6:55 its flow, and accordingly the overflow from the series of tanks was stopped. Another alarm, the "conductivity alarm" did not operate and was found to be full of sand and lint although it still should have functioned. By 8:00 p.m. crews were at work sandbagging to stop the spread of the flow and at 9:15 pumps were brought in to assist.

Unfortunately there was during the time involved a change in shift and someone moved a pump and the flow started again. The Department of Fisheries, had taken samples at around 8:00 p.m. which formed the basis of the controlled study previously mentioned. They also examined the foreshore and found no dead fish or other signs of a toxic effect.

In summary therefore there was a technical breakdown of either four or five warning devices, an inconclusive initial response to the alarm that did work. Basically, there was some confusion and lack of response and control capability once the spill was located and cleanup and retention were underway.

Dr. Walden, an expert biologist, testified on behalf of the defendant. He is an eminent member of his field which includes Industrial Micro-Biology with over fifty articles and papers relating to the pulp and paper process. He is also a member of the B.C. Research Council, and the Provincial Pollution Control Appeal Board.

Dr. Walden was asked to assess the spill on behalf of the company. He first described the pond area adjacent to Harmac, in terms which it co-exists with the environment, but "its not the best". He described the pulp process and chemical residue, the weak black liquor. His observations confirmed that there was no marine loss, and that the maximum life of the water would be between five to seven days, and that this waste is bio-degradable with no residual effects. It was also his observation that it was fortunate that at the time of the spill there was a high tide which maximized the dilution of the black liquor into the ocean. It was his estimate that on the expiration of between five and seven days the matter would have become completely inert and dispersed. It was obvious from Dr. Walden's opinion that the waters immediately adjacent to Harmac are, marginally useful for aquatic existence.

It is without question that the whole topic of pollutants and the environment are of great concern both to the Canadian public and hopefully to Canadian industry. The importance of this topic was expressed in *Regina v. Westmin Resources Ltd. (Western Mines Limited) 1985 1 W.W.R 30 at page 35*. Mr. Justice Seaton expresses the view:

> "I express the suggestion to the accused that the community as a whole considers pollution to be a very important matter. I would hope that on the retrial the accused too would think that to be so and would face its responsibilities to deal with the matter on its merits. I think that the way in which this matter has progressed does not bring credit to those involved."

On the facts before me, however, there is no suggestion that MacMillan Bloedel has not lived up or tried to live up to its' corporation responsibilities. To the contrary, at the time that the spill took place, there was already extensive programs under way to prevent the breakdowns which occurred, and this program has continued with considerable expenditure to prevent such an occurrence. The understanding is that the company has expended up to $150 000.00 to prevent a similar occurrence.

Defence counsel cited the case of *Regina v. The Prince George Pulp and Paper Limited*, a decision of His Honour Judge R.S. Munro, in Prince George Provincial Court, October 6, 1982. Effluent was put into lagoons for treatment before discharge into the river. The company has set up a system, and instruments to show the flow from one area to the next, much the same as the Harmac tanks. They also had inspections every four hours. The ponds overflowed onto the land. "The system was good, but the carrying out of the system was not." (underlining mine - see at page 3) and further:

> "They had a system which carried on well for years, but because of human error ...must be considered. Instrumentation by itself was not good enough. Instrumentation working with humans apparently was not good enough."

There was a considerable amount of work done to remedy the situation, and the Court considered this more of a deterrent than a heavy fine and imposed a $2 000.00 fine.

Those factors were present to a greater degree in the case before me, and in addition the response was confused and inadequate.

Crown Counsel advanced the case of *Regina* v. *Canadian Forest Products Limited*, a decision of the late Judge J.S.P. Johnson in Sechelt Provincial Court on September 23, 1981. The facts of that case come close to the facts in the case before me. There had been a previous conviction, a fine of $10 000.00 after which their spill took place. His Honour found that the company had made an "inherently wrong decision" (consciously) though it was an emergency situation. Further aggravated circumstances were that they knew the disposal was unpredictable and resulting from a substantial breakdown of equipment and the mill involved was old and in disrepair. They also had not consulted with various environmental parties who were concerned. In summary, the assessment of this case is that it was a somewhat aggravated case where notice had been given by the crown to seek greather punishment by reason of a previous conviction and in fact there were two previous convictions of which resulted in a fine of $10 000.00 and a subsequent one in which they were found guilty of six counts and fined a total of $20 000.00 on each count. His Honour observed that there were substantial differences in the previous convictions, that the case which he had before him. The earlier cases showed almost a total disregard for pollution control and the defendant was "negligent in allowing toxic material to run down into ditches", and the corporation had continued the discharge notwithstanding the Fisheries Officer had pointed out the discharge, and it went on for a substantial period of time. Notwithstanding that, there was a record, His Honour concluded that the case immediately before him was a "single, immediate discharge that the response was immediate". In the circumstances of that case, many of which are present in the case before me, that the appropriate fine should be $25,000.00. Similar to the case before me there was also a substantial expenditure in the neighbourhood of $700,000.00 on environmental control equipment and a total upgrading of the mill.

The case of *Regina vs. Placer Developments Ltd.* which is a decision of Territorial Court Judge B.D. Stewart handed down in the Yukon on January 3, 1985, the interesting thoughtful analysis factors in sentencing in these environmental - pollution type of cases. The factors which he considers important and with which I respectfully agree, are the subsequent actions of the offender, the remorse shown for the offence, whether government inspectors had been involved in trying to prevent deficiencies in the plant operation, the cause of the spill and its report, and lastly, the company's cooperation. The learned Judge in the case concluded that there was a genuine corporate concern for the protection of the environment, and this was a mitigating circumstance. In the case, at bar, all of these factors are present, and favourable to the defendant.

The learned Judge then, as apparently had been discussed between counsel, considered whether a discharge would be appropriate. Finding that not to be the case he imposed a fine of $1.00 and conditions made under an Order pursuant to section 33(8) (sic) and (7) of the *Fisheries Act*. What had occurred was that a scheme of preventing and rectifying the problems has developed, further presiding Judge concluded that he was indeed dealing with a good corporate citizen and that it would be an innovative and purposeful sentencing alternative. I will not go into the detailed agreement under section 33(7) other than to say that it might be more usefully employed from time to time in situations such as the one just presently before me. In many ways MacMillan Bloedel at its Harmac plant had undertaken steps which were taken by Placer Developments Limited.

In the case of *R. vs. Canadian Celluloid Company* reported 1979, B.C.D. Criminal Convictions 5490-11 is a decision of His Honour Judge Lowe of the Prince Rupert County Court. The trial Judge had imposed a fine of $3 500 or three days what amounts to a continuing offence, although related to one incident. His Honour reduced the fine to $1 000.00 per day. The principal reason for (sic) the sentence was the failure of the company to react properly when one of its transformers exploded. There was no previous conviction. The sentence was reduced to $1 000.00. Apart from that, however, the clean up resulted in a cost of some $200 000.00 for land fill and the defendant apparently acted as a good corporated citizen in accepting an expensive solution to the problem. What I consider to be a more difficult case is that so many things went wrong in the case before me. It was not a question of a sudden occurrence but a total failure or breakdown of the mechanical devices involved, and indeed the response at Harmac seems to be different from the Canadian Celluloid case.

In *Regina v. United Keno Hill Mines Limited* (1980) 10 CELR 43. This is a most thoughtful decision of the Territorial Court of the Yukon. His Honour, Judge Stuart in this judgment I have seen repeated nearly all of the judgments at page 46 of his decision:

> "The severity of penalties established by legislation and imposed by courts provide a reading of society's perception of the importance of environmental abuses."

and further on page 46:

> "Pollution is a crime.. Pollution has been directly linked to causing or aggravating a number of serious illnesses. The ramifications of disturbing the balance of nature are never fully understood until it is often too late. Seemingly small consequential acts of pollution are cumulatively imposing extensive tangible social costs."

His Honour then on page 47 goes on to list the factors relevant to the nature of the environmental damage. The first factor in the Keno Mines case was the nature of the environment. The court was obviously concerned with the delicate environment of the Yukon. Of course, that is not entirely applicable to the waters adjacent to the Harmac plant. As Dr. Walden said, the environment near the plant is not the best in any event. So far the extent of injury to the environment is concerned, there does not appear to have been any measurable effect in the case before me. It seems reasonable that the greater the extent of injury then proportionately the higher degree of punishment. Both of those factors not being present in the case before me, it seems reasonable therefore, to conclude that the negligence it not an aggravated relative to the environment. The crown's position in this case has been that from past history, and by the nature of the facts leading up to the offence than an increase penalty, that is over $10 000.00 should be imposed. With great respect I think the other mitigating factors would detract from a higher fine.

There does not appear to have been a willful disregard for the environment nor a surreptitious violation to the corporation advantage. They did act to abate the problem, albeit, with some delay, therefore, it seems to be a somewhat lesser blameworthy case. Further, however, I am satisfied that the corporation in this case has tried to comply with government regulations and further has tried to specifically remedy the problem. They have demonstrated their remorse by extensive construction which was not only going on during the time the events transpired but continued well beyond the day of violation. It is of course, a distinct factor that one take judicial notice of the size and wealth of a corporation. The larger the corporation, the larger the fine. (See *Regina v. Cypress Mines, Yukon Supreme Court, March 26, 1976; and R. v. Canadian General Electric Company Limited*, (1977) 2 D.L.R. 230). The defendant here is certainly one of the leaders in forestry in the Province of British Columbia and in consequence a penalty must reflect that. The defendant, of course, did not realize any profits as a result of the offence, therefore, the matter is restricted to deterrence of pollution.

Having considered all the matters that the defendant took in hand once the incident occurred, I am satisified that they are assuming their proper responsibility.

As no suggestion was made for an Order under section 33(7) that matter becomes academic although I would have preferred to see some action of that sort in view of the continuing efforts by the defendant to prevent a similar occurrence. Many of the terms and conditions in *Regina v. Placer Development Limited, supra* might well have been helpful to prevent further difficulties at the Harmac site. In any event, for the factors which I have considered I have concluded that this incident should be treated in a similar fashion to the previous conviction and a similar fine imposed. The mitigating circumstances which I have already outlined convinces me that a higher fine should not be imposed.

The fine will be in the amount of $10 000.00, in default, a distress. I assume the Crown will allow such time as is necessary for the payment to be made.

NEW BRUNSWICK PROVINCIAL COURT

R.v. McCAIN FOODS LTD.

CROCCO, Prov. Ct. J. February 27, 1984

***Fisheries Act*, R.S.C. 1970, c.F-14, as amended - Accused charged with eight counts of violating section 33(2), depositing a deleterious substance into water frequented by fish.**

Sentencing - Accused convicted - $1.00 fine levied on each count - Mitigating circumstances present.

The accused was charged under section 33(2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, following the company's discharge of effluent from its food processing plants directly into the Saint John River. Samples of the effluent taken from two McCain plants were subjected to flow through bioassay tests to determine whether or not healthy fish would die when exposed to this effluent. The fish died, thereby proving the substance was deleterious.

Held, the accused was convicted on all of the eight counts.

The effluent from the two McCain plants was deleterious and at all material times deleterious effluent was discharged directly into the waters of the St. John River at both locations. Water frequented by fish is defined by section 33(11) to mean Canadian fisheries waters.

It is not necessary to establish the actual presence of fish in the water; rather the obligation is upon the defendant to show that the water was not so frequented. There was evidence of the presence of trout, juvenile salmon, pickerel, bass, landlocked salmon, yellow perch and minnows in the waters of the St. John near the two McCain plants. It was not necessary to establish by direct evidence that there were fish in the St. John where the effluent was discharged into it (*R.v. MacMillan Bloedel Alberni Ltd. and R. v. Cyanamid Canada Inc.*).

The defence submissions that minimum costs to meet the demands of environmental officials would be prohibitive and would threaten the continuation of operations, especially at the Florenceville plant, were not a defence to the action but rather went to the mitigation of sentence.

James D. Bissell, for the Crown.
Donald M. Gillis, Q.C. for the Accused.

CROCCO, Prov. Ct. J.

After reviewing the evidence, I find as proven facts in the case at bar that McCain Foods Limited is and at all material times was a body corporate carrying on business as a food processor at or near Florenceville in the County of Carleton and Province of New Brunswick and also at a plant at Grand Falls in the County of Victoria and Province of New Brunswick. On or about the 11th, 12th, 13th and 14th days of May at Florenceville and on the 18th, 19th, 20th and 21st days of May at Grand Falls the Company did deposit an effluent from their plants directly to the waters of the Saint John River.

The main ingredient of the charges against them is first whether the effluent discharged into the river Saint John was "a deleterious substance" and whether or not the discharge was "in waters of the Saint John River, being water frequented by fish".

I find as a matter of fact that one the 11th, 12th, 13th and 14th days of May 1982 continuous twenty-four hour samplings of the effluent were taken by the federal environmental officials at the Florenceville plant and that on the 18th, 19th, 20th and 21st days of May 1982 twenty-four hour samplings of the effluent were taken by the said officials at the Grand Falls plant.

The samples were taken to the Bedford Institute at Dartmouth, N.S. daily and subjected to tests to determine whether or not the effluent was deleterious. These tests were performed by one, Roy Parker, who was qualified as an expert witness by the Court as an aquatic toxicologist. Mr. Parker testified that the procedures throughout the tests from the time of the sample collection until the termination of the tests complied strictly with those published guidelines and established laboratory practices since 1980. These tests were not challenged successfully by the defense.

The samples of the effluent were mixed in three containers of 100% effluent and thirty rainbow trout fingerlings were exposed to the effluent. The details of the tests were related to the Court in evidence and it is not considered necessary to set forth herein but they are accepted as the proper tests to be made for a flow-through bioassay test to determine whether or not healthy fish would die when exposed to this effluent, which they did.

The times of death of the fish when exposed to the effluent from the Florenceville plant show within one hour of commencement of testing and from the Grand Falls plant anywhere from two hours to twenty-two hours after exposure to the effluent.

I accept the evidence of Roy Parker, the qualified toxicologist, and his procedure in testing the effluent resulted in his conclusion that the effluent discharged in the Saint John River from the two plants in Florenceville and Grand Falls on the tests hereintofore stated were deleterious and I further find as a fact that all material times this deleterious effluent was discharged directly into the waters of the Saint John River both at Florenceville and Grand Falls.

BEING WATER FREQUENTED BY FISH

Water frequented by fish is defined by ss 33(11) to mean Canadian fisheries waters. Thus it is not incumbent to establish the actual presence of fish in the water. Rather the obligation is upon the defence to show that the water was not so frequented. Para 33.4(3)(b) provides:

> (b) no water is "frequented by fish" as defined in subsection 33(11) where proof is made that all times material to the proceedings the water is not, has not been and is not likely to be frequented in fact by fish.

I accept the evidence of Hannah and Michaud of the actual presence of fish in the waters of the Saint John River near the two McCain plants. Their evidence discloses the presence of trout, juvenile salmon, pickerel, bass, landlocked salmon, yellow perch and minnows.

It was argued by the defence that it was incumbent upon the Crown to establish by direct evidence that there were fish in the water of the Saint John River where the effluent was spilled into it. Refer to *R. v. MacMillan Bloedel (Alberni) Limited (1979), 47 CCC, 2d, 118 and R. v. Cyanamid Canada Inc. (1981) 11 CELR' 31*:

> "I think that approach too narrow. It restricts the enquiry to commercial fish present at the moment of the spill in the very drop of water into which the oil was spilled. I am not prepared to accept any of those restrictions. The definition of "fish" is given in the act and it is broad. The section does not speak of "water in which there are fish" but of "water frequented by fish". To restrict the word "water" to the few cubic feet into which the oil was poured would be to disregard the fact that both water and fish move. I think that the learned County Court judge did not err in law when he concluded that this deposit took place into water frequented by fish."

So I find as a matter of fact that this deleterious effluent was in fact discharged into the waters of the Saint John River which are waters frequented by fish.

STRICT LIABILITY OFFENCE

Section 33(2) of the Fisheries Act is not a mens rea offence. In *R. v. Churchill Copper Corporation Ltd. 1971 4 W.W.R. 481* it is categorized as a strict liability offence.

It is the submission of the defence that in order to meet the demands of the environmental officials re discharging of the deleterious effluent into the Saint John River, the minimum costs of meeting the demands would be prohibitive and threatens the continuation of operations especially at the Florenceville plant. Unfortunately this is not a defense to the action but rather to the mitigation of the sentence.

I find that the defendant is guilty of all eight charges.

There are mitigating circumstances in this case as follows:

(1) there is no evidence that any fish were actually killed by the effluent.

(2) there is evidence that there were negotiations going on between McCain Foods Limited and the department officials concerning the nature of the effluent being discharged into the Saint John River.

(3) that McCain Foods were never told the results of the testing of the effluent by the Department and only became aware of it when the Informations were laid on the 16th day of August 1983 although the testing was done on the 11th to the 14th and the 18th to the 21st days of May 1982.

As stated before these are mitigating circumstances and should be considered in sentencing.

"The penalty section of the *Fisheries Act* which applies to the charge before this Court provides that a fine as a penalty be imposed by the Court. The maximum penalty permitted is a fine of fifty thousand dollars for the first offence. There is no minimum penalty prescribed. The Court, therefore, is left with a wide discretion as to the penalty to be imposed. It is the function of the Court to weigh the severity of the offence before the Court and by the fine imposed to indicate how severe an offence the Court deems the particular offence before it to be."

Under the circumstances of this case, no actual damages were proven to the Court and so therefore McCain Foods Limited is hereby fined the sum of one dollar on each of the eight separate charges.

BRITISH COLUMBIA PROVINCIAL COURT

R.v. McKAY AND BROWN

SMITH, Prov. Ct. J. Williams Lake, March 10, 16, 1983

***Fisheries Act* R.S.C. 1970, c.F-14 as amended - Accused found guilty of charge under section 31(1), unlawfully carrying on a work or undertaking resulting in the harmful alteration, disruption or destruction of fish habitat - *De minimus non curat lex* and due diligence defences considered and rejected.**

Sentencing - mitigating circumstances - absolute discharge granted.

Both accused, McKay and Brown were employees of the Ministry of Forests and were in charge of two tractors that were clearing fire brooks in the Kleena Kleene area. While the tractors were crossing Porcupine Creek, one of them became stuck and caused a depression in the spawning gravels. According to expert testimony, fish would not spawn there following such alteration.

The defence raised two arguments. They contended that the doctrine of *de minimis non curat lex* applied, since the disruption of the fish habitat was of such small consequence. They also submitted that all reasonable care had been taken.

Held, the accused were convicted on the charges.

The Court held that the doctrine of *de minimus non curat lex* did not apply in this case and that the accused had not proved on a balance of probabilities that they took all reasonable care. The accused knew this may be a spawning bed, but took no steps to ascertain if it was. If they had taken reasonable steps to find out if this was a spawning bed, and reasonably believed it was not, this may have constituted a defence. The chance that harm would occur would be significantly higher in a spawning bed than in another part of the creek. Here the accused were involved in activity with laudable objects but (1) the burden of checking to see if this was a spawning creek was small; and (2) the burden of taking steps to protect this stream on crossing was small.

In looking at the whole of the circumstances, including the fact that not much damage was done, that corrective steps were taken in regards to damage that occurred as a result of the tractors clearing accesses up the banks, and including the remedial steps that the two departments have taken to prevent happenings like this in the future, the Court found that it would not be contrary to the public interest, instead of convicting the accused to order that they be discharged absolutely.

L. Fisher, for the Crown.
S.B.K. Brackenbury, for the Accused.

SMITH Prov. Ct. J.

Pine Beatles, after destroying the forests in the Kleena Kleene area, left in their wake fuel for their natural enemy, fire. On October the 21st, 1981, two tractors driven by Len Bursinger and Heinz Krauss, under a contract to the British Columbia Ministry of

Forests, worked clearing a fuel break to protect life and property in the Kleena Kleene area. They crossed a small creek, known locally as Porcupine Creek. Mr. Krauss' tractor sank in the creek bed, stuck. In a matter of minutes it was on it's way, clearing an access up the steep bank of the other side. That crossing gives rise to this case.

The creek where the crossing was made is a trout spawning ground. Sinde Brown and Richard McKay, the accused were employees of the Ministry of Forests, and they were in charge of the tractor operators.

The Information reads: Richard McKay and Sinde Brown, on or about the 21st day of October, A.D., 1981, at Porcupine Creek near Clearwater Lake, in the County of Cariboo and Province of British Columbia, did unlawfully carry on work that resulted in the harmful alteration, disruption and destruction of fish habitat, contrary to Section 31(1) of the *Fisheries Act*.

The defence raises two central issues. One: was the harmful alteration, disruption and destruction of the fish habitat, was of such small consequence that the law should not bother with it (*de minimis non curat lex*). Two: do the accused have open to them the defence of taking all reasonable care? If this defence is open, has each accused established on the balance of probabilities that he or she took reasonable care? See *R.* v. *Sault Ste. Marie* 3 C.R. (3d) 30, and *R.* v. *Richmond Plywood Corporation Ltd.* 63 C.C.C. (2d) 99, and also Section 33.8 of the Fisheries Act.

Facts: Porcupine Creek is the main spawning stream to Clearwater Lake. It has trout, suckers and shiners. Mr. Leggett, the Regional Fish Biologist for Fish and Wildlife, testified that it is important as the Ministry does not stock Clearwater Lake. The fish spawn in May and hatch from mid-June to late June. During spawning, the female trout dig reds or nests, four to six inches deep and cover them with gravel. The eggs require clean, cool oxygenated water. If the eggs are covered with silt, this diminishes the supply of oxygen and losses occur.

If shash and debris were left in this creek, this would be of concern because then high water blockages would occur. The stream would dig new channels and release the fine, unstable soil located in the area in question. Over a period of time, the debris would use up the oxygen in the water. Oxygen is necessary for trout, expecially in the incubation stages. Mr. Leggett testified that a depression in the creek bed caused by a tractor, would compact the spawning gravels and the fish would not spawn there.

The Fuel Break: Special funding was obtained by the Ministry of Forests, from the Legislature, to build a fuel break in the Clearwater, Kleena Kleene area. The purpose was to protect life and property in the case of fire, by gaining access to areas and by using the fuel breaks to back fire from. There was a sense of urgency about the work because of the season and there was some conflicting evidence to indicate that if the work was not done within a certain time frame, the funds would be stopped. Normally referrals are made to the Fish and Wildlife by the Ministry of Forests, about crossing creeks. Mr. Ronald Reeves, the District Manager for the Ministry of Forests for the area in question, decided in the late summer or early fall of 1981, that because of the urgency, they would forgo the formal referrals to Fish and Wildlife so the work would not get bogged down. David Nelson, of Alexis Creek at that time, was to be in charge of the formal and informal referrals to the Fish and Wildlife. No referrals regarding the Porcupine Creek crossing were made.

Sinde Brown was directly in charge of the two tractors in question. When they approached Porcupine Creek, she was aware that it could be a spawning ground, but she took no steps to find out if this was in fact a spawning ground. She decided not to clear the steep banks on either side of the stream with machinery, but to handclear it instead, so as not to disturb the soil and cause siltation of the stream. When she came to the stream, she reported to Richard McKay, her immediate superior. He came the following day and the two accused walked the stream, checking for the best crossing. Mr. McKay, I find, also has suspicions about this being a spawning creek. They found a spot they thought was firm enough for a tractor to cross. Sinde Brown testified that Mr. Krauss poked a stick in the mud in the stream bed there and he did not think there would be a problem crossing. She said that Mr. McKay thought the bed there was firm enough and did not think the crossing would cause problems.

Mr. McKay testified that the was away on vacation, ending around the 14th of October, 1981. When he came back to work he checked with his immediate superior, Mr. Nelson, at Alexis Creek, to see if any referrals had been made to Fish and Wildlife. He was informed that they had not been done. On one other occasion he asked Mr. Nelson if they were going to make referrals and was advised, "No, not at this time."

The tractors made an access down one bank and up the other bank. At the stream the first tractor, as I've already mentioned, became stuck. It left a depression of significant depth in the stream bed. The other tractor crossed in the same place. The second crossing was later made in a different place, twenty-five or thirty yards upstream from the first crossing, when the tractors were finished their work and on their way back. There some trees were pushed into the creek so the tractors would not damage the creek bed. This crossing is not part of the charge that is in front of me and I do not need to deal with it. I am dealing only with the first crossing.

There was debris left in the stream at the crossings. The Ministry of Forests planned on clearing the debris from the stream and had arranged for a skidder with a backhoe attachment to come in and do the work. This work was not carried out because of an order from Mr. Karup, a Conservation Officer. Later the area was cleaned up and water bars were built across the accesses that went down to the stream banks. This was done to prevent silt entering the stream. The waterbreaks were planned in conjunction with the Fish and Wildlife people after the crossing had been made.

Mr. Leggett testified that crossing the fall would minimize the damage, that if the debris had been removed and waterbreaks had been built immediately, damage would have been minimized. He said the only permanent damage would be the compaction of the spawning gravels. I find that the waterbreaks were built sufficiently soon and the debris was removed with sufficient speed to minimize damage and while the potential for siltation occurred, I find that in fact there was not much siltation.

The *Fisheries Act*: Section 31 of the *Fisheries Act* provides:

"(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

(3) Subsections 33(6) to (9) apply in respect of an offence under this section as if it were an offence under section 33.

(5) For the purposes of this section and sections 33, 33.1 and 33.2, "fish habitat" means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes."

Section 33.8 provides,

"(8) In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission."

It was admitted by Mr. Brackenbury on behalf of the accused that the creek in question was a fish habitat. I am satisfied beyond a reasonable doubt that the first crossing resulted in the harmful alteration, disruption or destruction of fish habitat. I am satisfied that the harm resulting from the crossing was significant, particularly because of the importance to Clearwater Lake of this spawning area. The principle that the law does not deal with trifles does not apply to the facts of this case.

In *R. v. Sault Ste. Marie*, (1978) 40 C.C.C. (2d) 353; 3 C.R. (3d) 30, the Supreme court of Canada held that there were three categories of offences. One, full mens rea offences, requiring proof by the prosecution of a positive state of mind such as intent, knowledge or recklessness; two, strict liability offences in which there is no necessity for the prosecution to prove mens rea, but which leave it open for the accused to avoid liability by proving that he took all reasonable care; and three, offences of absolute liability where it is not open for an accused to exculpate himself by showing he was free of fault. At page 54 of the decision, Mr. Justice Dickson, delivering the unanimous decision of the Supreme Court of Canada, stated,

> "Offences which are criminal in the true sense fall in the first category. Public welfare offences would prima facie be in the second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly" or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the legislature had made it clear that fault would follow proof merely of the prescribed act. The overall regulatory pattern adopted by the legislature, the subject matter of the legislation, the importance of the penalty and the precision of the language used, will be primary considerations in determining whether the offence falls into the third category.

Ontario Water Resources Act, s. 32(1)

> Turning to the subject matter of section 32(1) -- the prevention of pollution of lakes, rivers and streams -- it is patent that this is of great public concern.

> Pollution has always been unlawful and in itself a nuisance: A riparian owner has an inherent right to have a stream of water "come to him in its natural state, in flow, quantity and quality". Natural stream which formerly afforded "pure and healthy water" for drinking or swimming purposes become little more than cesspools when riparian factory owners and municipal corporations discharge into them filth of all descriptions. Pollution offences are undoubtedly public welfare offences enacted in the interest of public health. There is thus no presumption of a full mens rea."

At page 58, Mr. Justice Dickson states:

> "Since the issue is whether the defendant is guilty of an offence, the doctrine of respondent superior has no application. The due dilligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment; the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offences and by taking reasonable steps to ensure the effective operation of the system."

That is similar to section 33(8) of the *Fisheries Act*. I find that that Section does not apply here. That section only affords a defence where the offence was committed by an employee or agent of the accused, and the accused establishes two things. One, that the offence was committed without his knowledge and consent, and two, he exercised all due diligence to prevent it's commission. Here the act was committed with the knowledge and consent of both accused and Section 33(8), I find, does not apply.

I will treat this as being in the second category of offence referred to by Mr. Justice Dickson in the *Sault Ste. Marie* case, that is as a strict liability offence, which leaves it open to the accused to avoid liability by proving he took all reasonable care. See *R. v. Richmond Plywood Corporation Ltd.*, (supra).

The accused knew this may be a spawning bed, but took no steps to ascertain if it was. If they had taken reasonable steps to find out if this was a spawning bed, and reasonably believed it was not, this may have constituted a defence. The chance that harm would occur would be significantly higher in a spawning bed than in another part of the creek. Here the accused were involved in activity with laudable objects but (1) the burden of checking to see if this was a spawning creek was small; and (2) the burden of taking steps to protect this stream on crossing was small.

Looking at the whole of circumstances, I find that the accused have not proved that they took all reasonable care. I find that the crown has proven the guilt of each accused, beyond a reasonable doubt.

SENTENCING

The two accused were charged that on or about the 21st of October 1981, at Porcupine Creek, near Clearwater Lake, in the Province of British Columbia, they did unlawfully carry on work that resulted in harmful alteration, disruption and destruction of fish habitat, contrary to Section 31(1) of the *Fisheries Act*. This matter is now before me for sentencing. The two accused were convicted of the offences alleged.

. . .

Normally offences of this nature have been dealt with by fines, but Section 27 of the Interpretation Act provides that all provision of the Criminal Code relating to Summary Conviction offences, apply to all other offences created by enactment, except to the extent that the enactment otherwise provides. It is common ground that the discharge provisions of the Criminal Code are open to me.

The Crown submits that a fine is appropriate, Mr. Brackenbury submits that a discharge is appropriate. Neither accused has been convicted of an offence before. The pollution of lakes, rivers and streams, as Mr. Justice Dickson in the Supreme Court of Canada, *Sault Ste. Marie* case, is of great public concern. Mr. Brackenbury says the accused should not be responsible because the accused were carrying out orders. I do not agree with that. If our society is to function in a healthy manner, it must be based on individual responsibility. People cannot simply pawn off their acts as acts of corporations or governments.

That does not mean that a discharge would not be appropriate, but I do not agree with what Mr. Brackenbury there said, with all due respect to him.

This Court does not decide who to charge or what charges should be made. That is done before the case is presented to the Court, and a Judge is careful to learn about a case only from the evidence he hears in Court, so that he can remain impartial and unbiased. It is not the function of this Court to carry out an inquiry as to the relationship between the Ministry of Forests and the Fish and Wildlife Branch. I must deal only with the charges that are in front of me. I can, however, look at all the surrounding circumstances in determining what would be an appropriate disposition.

The Ministries involved have taken steps since the 21st of October to ensure that situations like this do not re-occur in the future. Section 662.1 of the Criminal Code provides for a discharge where the Court considers it to be in the best interest of the accused and not contrary to the public interest. The British Columbia Court of Appeal considered when it would be appropriate to discharge an accused. The case I'm referring to is *R. v. Fallofield (1973)* 13 C.C.C. (2d) 450.

> "(1) The Section may be used in respect of any offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death."

I pause there. The Crown here proceeded by summary conviction, and according to Section 31 of the *Fisheries Act*:

> "every person who contravenes Subsection 1 is guilty of an offence and liable
>
> (a) on summary conviction to a fine not exceeding five thousand dollars for a first offence and not exceeding ten thousand dollars for each susbsequent offence."

So, there is no minimum punishment prescribed and the offence is not punishable by imprisonment for fourteen years or for life or by death. The second point the Court of Appeal makes is:

"(2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation."

And here, although this was not a trivial violation, it is proper, I think, to point out that it was a violation where there was not a great deal of damage. This is not similar to the situation where huge amounts of oil are spilled into waters or where a large amount of harm results from the actions of the accused. The third point the Court of Appeal makes in *R. v. Fallofield* is:

"(3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he be discharged either absolutely or upon condition. If it is not in the best interest of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interest of the accused, then that brings the next consideration into operation."

I earlier commented, the other day, that in my opinion it was in the best interest of the accused that they be discharged. Point four that the Court made is that:

"(4) the second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest."

The fifth point:

"(5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions."

Six:

"(6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions."

Seven:

"(7) The powers given by S. 662.1 should not be exercised as an alternative to probation or suspended sentence."

Eight:

"(8) Section 662.1 should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases."

In looking at the whole of the circumstances, including the fact that not much damage was done; that corrective steps were taken in regard to damage that occurred as a result of the tractors clearing accesses up the banks, and including the remedial steps that the two departments have taken to prevent happenings like this in the future, I find that it would not be contrary to the public interest, instead of convicting the accused, to order that they be discharged, and I order that they be discharged absolutely.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. CITY OF MERRITT AND B AND E REFRIGERATION CO. LTD.

BLAIR, Prov. Ct. J. Kamloops, September 11, 1986

***Fisheries Act*, R.S.C. 1970, c.F-14 as amended - Both accused charged with two counts under section 33(2) - Depositing a deleterious substance into water frequented by fish - Anhydrous ammonia into the Nicola River - City of Merritt exercised due diligence by hiring of experts in the field of refrigeration - B & E as agent of the City of Merritt, found guilty on one count.**

Sentencing - Mitigating factors - B and E Regrigeration Co. Ltd. would not have been able to determine that the drain went into the river had they taken the precaution to contact the City - Accused is a small company - Fine of $1500 levied.

Both the City of Merritt and B and E Refrigeration Co. Ltd. were charged with two counts each of violating section 33(2) of the *Fisheries Act*, depositing a deleterious substance into water frequented by fish. The charges arose out of the following circumstances. In August of 1985, the city contracted B and E Refrigeration Co. Ltd. to upgrade the City's ammonia mechanical refrigeration system. During B and E's performance of that contract, water samples taken from the Nicola River below the drain outlet connected to the sump pump in the refrigeration room of the plant revealed lethal dosages of ammonia, while samples taken above the drain did not.

Further, it was determined that fish had died below the drain outlet, but not above the outlet. An environmental official also observed a discharge of very strong liquid at the drain outlet area and was of the opinion that the liquid smelled of ammonia. An official also attended to the company refrigeration room and smelled the same smell as at the river, but it was stronger.

Held, the City of Merritt was found not guilty on counts one and two. B and E Refrigeration Co. Ltd. was found guilty on count one and not guilty on count two.

The Court found that the City's hiring of experts in the field of refrigeration constituted an exercising of due diligence to prevent the commission of the offence.

The Court held that B and E Refrigeration Co. Ltd. had been working on the equipment containing the ammonia and either by design or accident, allowed the ammonia to mix with water and to be placed, or escape into the drain.

The Court found that the company had violated regulations governing mechanical refrigeration plants, specifically those that prohibit the intentional placing of ammonia into a sewer.

It was found that if officials from B and E Refrigeration had contacted the City to inquire about the drain from the sump, they would not have been able to determine that the drain went directly into the river. The Court considered this a mitigating factor to be considered in sentencing as well as the fact that B and E Refrigeration Co. Ltd. is a small company. A fine of $1000 was levied against the company.

F. Kaatz, for the Crown.
R. Hunter, for the Accused (City of Merritt).
R. Jackson, for the Accused (B and E Refrigeration Co. Ltd.).

BLAIR, Prov. Ct. J.

The City of Merritt and B and E Refrigeration Co. Ltd. are charged on Count One, that on or near the City of Merritt, in the Province of British Columbia, did deposit or permit the deposit of a deleterious substance, to wit: Anhydrous Ammonia, in the water frequented by fish, to wit: the Nicola River. Contrary to Section 33, sub section (2) of the *Fisheries Act*.

And on count two. On or about the 12th day of August, A.D. 1985, at or near the City of Merritt, in the Province of British Columbia, did deposit or permit the deposit of a deleterious substance, to wit: Anhydrous Ammonia, in a place, to wit: a sump located in the Merritt arena at 2051 Mamette Avenue, under conditions where such deleterious substance or any other deleterious substance that resulted from deposit of the deleterious substance entered water frequented by fish, to wit: the Nicola River. Contrary to Section 33, sub section (2) of the *Fisheries Act*.

During August of 1985, a contract between the City of Merritt and B and E Refrigeration Co. Ltd. calling for the upgrading of the refrigeration plant in the Nicola Valley Arena, Merritt, British Columbia, was being performed. The ammonia mechanical refrigeration system upgrading by B and E Refrigeration Co. Ltd. commenced on August 12th, 1985. At the relevant time no other items containing ammonia were being operated, repaired, or replaced at the arena. No one in the employment of the City of Merritt, and no one other than B and E Refrigeration Co. Ltd. was using the refrigeration equipment.

In the refrigeration room there are two drains in the floor, flowing to a sump; the sump pump drains the liquid into the Nicola River. It was determined that there were dead fish in the Nicola River below the drain outlet, but not above the outlet. It is admitted that the Nicola River consists of water frequented by fish. Water samples were taken from the River on August 12th, 1985, and August 13th, 1985. Samples taken below the drain outlet contained lethal dosages of ammonia, that is anhydrous ammonia, while those samples taken above the drain did not.

Mr. Robert Gracie of the Ministry of Environment, did some preliminary analysis on water samples from the Nicola River for chlorine content. He found that the samples did not contain a high concentration of chlorine, and therefore was able to eliminate the City Pool as a source of contaminant of the river. He saw a discharge of a very strong liquid at the drain outlet area, and he was of the opinion that the liquid smelled of ammonia. Mr. Gracie attended to the refrigeration room and smelled the same smell as at the river, but it was stronger.

I find, as a fact, that a toxic level of anhydrous ammonia, a deleterious substance, was placed into the sump at the arena, and that the liquid flowing in the drain from the sump entered the Nicola River. It is clear that the ammonia, after entering into the Nicola River and mixing with the river water, was still at such a concentration as to be toxic to fish. I am satisfied that B and E Refrigeration Co. Ltd., had been working on the equipment containing the ammonia, and either by design or accident, allowed the ammonia to mix with water and to be placed, or escape into the drain.

The City admits that on August 12th, 1985, there were no maps or plans of the City Sewer System, in and around the arena. Mr. Raymond Jackson, works foreman for the City of Merritt, and the person in charge of City Personnel at the arena at the time B and E Refrigeration Co. Ltd. was upgrading the equipment, was unaware, if ever directing his mind to the issue, where liquid flowing from the sump went. Mr. John Welte, director of works and service for the Village of Logan Lake, and Raymond Jackson, both testified as to the involvement of Civic employees with regard to refrigeration plants. The rule is: that the maintenance of refrigeration equipment is left to qualified refrigeration personnel. Morris Piluk, an instructor in refrigeration and air conditioning, in the British Columbia Institute of Technology, agreed with their perceived responsibilities in the repair and maintenance of refrigeration equipment. To be qualified to work in the field requires the completion of a four-year apprenticeship course. To complete a project such as that being performed at the City of Merritt, by B and E Refrigeration Co. Ltd., requires the service men to have a valid certificate.

I'm told by Mr. Piluk, that if the ammonia escaped from the refrigeration system in a liquid state, it would vaporize immediately; as it boils at minus twenty-eight degrees farenheit, and is under pressure while in the system. If there was a leak from the water contained area in the compressor, the water, upon contact with the ammonia, would freeze almost immediately, at the point of the leak. The mixing of the water and ammonia would be minimal. I conclude that the mixing of the water with the ammonia would not have been an accidental occurrence.

The regulations governing mechanical refrigeration plants was referred to, specifically; regulation thirteen point zero four, which states: "Where ammonia is used the discharge may be into a tank of water which shall be used for no purpose except for ammonia absorption." The section continues on, but it's not relevant for my determination. Regulation thirteen point zero five states; "Refrigerants withdrawn from refrigerating systems shall be transferred to approved containers only. No refrigerant shall be discharged to a sewer." The procedure that is approved does not allow for the discharge of ammonia into the sewer. There is nothing then, that I heard, which would allow me to conclude that anything other than water would enter the sump. In otherwords, I conclude that only water would enter the sump under normal operation of the equipment, even if there were an accident or equipment failure and ammonia escaped. The regulations prohibit that which was done, that is; the intentional placing of refrigerant into the sewer.

Mr. Raymond Jackson is not qualified to comment on the operation of refrigeration systems, and I do not accept his evidence on such equipment. Personnel of the City of Merritt are required to maintain a refrigeration log which is used to insure the proper operation of the equipment. Such a log is not maintained when the refrigeration system is not in operation, that is; in August of 1985; as well, the log was not kept prior to September of 1985.

These offences, that is count one, and count two, are in the alternative, and both are strict liability offences. I'm satisfied that B and E Refrigeration Co. Ltd. allowed the ammonia, when mixed with water, to be placed into the sump, which is contrary to regulation sixteen point zero five, and I find the company guilty of count two. I accordingly, find the company not guilty of count one.

Should liability to the City of Merritt be found for the acts of B and E Refrigeration Co. Ltd., in placing the refrigerant in the sump, when such an act is contrary to the procedure set down by regulation. As well, the evidence is; that if there were an industrial accident and the refrigerant, that is the ammonia, was released, it would released in a vapor state not a liquid state. The ammonia could not be expected to enter the sump, this sump was not designed as it was in the case of *Regina v. The Corporation of the District of North Vancouver*, 3 F.P.R. 33, and specifically, July 9th, 1982, that is in that case it was designed to do precisely that which is prohibited by the *Fisheries Act*, namely to deposit in the event of an emergency, a deleterious substance into water frequented by fish. That was not the case with regard to this sump in the arena in the City of Merritt.

Section thirty-three, sub section eight of the Fisheries Act provides:

> "In the prosecution for an offence under this section, or section thirty-three point four, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, whether or not the employee or agent is identified, or has been prosecuted for the offence. Unless the accused established that the offence was committed without the knowledge or consent, and that he exercised all due diligence to prevent it's commission."

Mr. Justice Dickson, for the quote in *Regina v. Sault Ste. Marie*, 1978 40, C.C.C. 2(d) 353, and specifically at page three seventy-seven, seventy-eight, stated with regard to due diligence:

> "Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused direction or approval, thus negating willful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of an offence, and by taking reasonable steps to insure effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are the acts are therefore in law the acts of the corporation itself."

And further, the case two seventy-six, Mr. Justice Dickson says:

> "Nor does liability rest solely on terms of any agreement by which a defendant arranges for eventual disposal. The test is a factual one based on an assessment of the defendants position with respect to the activity which it undertakes and which causes pollution."

And at three seventy-seven:

> "In every instance the question will depend on an assessment of all the circumstances of the case. Whether an independent contractor, rather than an employee is hired, will not be decisive."

An example is used, and I quote:

> "A homeowner who pays a fee for the collection of his garbage by a business which services the area, could probably not be said to have caused or permitted the pollution, if the collector dumps the garbage in the river. His position would be analogous to a householder in Sault Ste. Marie, who could not be said to have caused or permitted the pollution here. A large corporation which arranges for the nearby disposal of industrial pollutants by a small, local, independent contractor with no experience in this matter, would probably be in an entirely different position."

And further at page three seventy-seven:

> "A municipality can not sluff off responsibility by contracting out the work. It is in a position to control those who it hires to carry out garbage disposal operations, and to supervise the activity, either by the provisions of the contract or by municipal by-laws. It fails to do so at its peril."

Notwithstanding whether B an E Refrigeration Co. Ltd., is the agent of the City of Merritt, one still has to consider the relative expertise of the City and B and E Refrigeration Co. Ltd. The City of Merritt and its employees have no expertise in the installation of refrigeration equipment, but rather they rely on the expertise of others, such as B and E Refrigeration Co. Ltd. Can it be said that they have not met the onus upon them when their expert agents or contractors have done something that is not permitted in the industry, that is; dumping refrigerant into the sewer. The hiring of experts in the field of refrigeration constitutes an exercising of due diligence to prevent the commission of an offence. I am satisfied that the City of Merritt established that the offence was committed without the City's knowledge or consent. And that the City exercised all due diligence to prevent its commission. I found the City not guilty on count one and count two.

SENTENCING

B and E Refrigeration Co. Ltd., has been found guilty on one count, which could generally be referred to as allowing a deleterious substance to be put in such a position that it enters water frequented by fish. In this case the substance was ammonia from a refrigeration plant that was being repaired by the company. I am told that the company, when draining the system was able to drain some ninety-five percent of the ammonia. At that time the remaining five percent of the ammonia was bubbled into water into the sump. Clearly in contravention of the practice that ought to be followed when dealing with refrigerant, in contravention of the regulations. I am told that if the drain itself, from the sump, had been attached to the sewer system there would have been no detrimental effect upon the sewer and there would be no fish kill. Had the individual from B and E Refrigeration contacted the City to inquire about the drain from the sump, from what I have heard from Mr. Raymond Jackson, Mr. Eddy would not have been able to determine that the drain went directly into the river. That does not totally negate his responsibility for the damages, but it mitigates in sentence, my view.

Defence counsel refers to the evidence of Mr. Kosacoski as being heresay. And that's true, but at this time I'm not bound by rules of evidence, I can take into consideration anything relevant provided it is not denied by defence. I accept that the value of fish destroyed by this release of deleterious substance can only, at best, be an estimate. But when one looks at the estimate of the damage of a relatively minor spill, or relatively minor escape of a deleterious substance, one is reminded how serious this type of offence is, and why there is the substantial penalty that can be imposed. Clearly a large spill over a period of time would have had a devastating effect that likely would not have, in the foreseeable future, been rectified. As it is, there has been substantial damage. I am told that B and E Refrigeration Co. Ltd. is a small company with very little in the way of assets, and very little in the way of income, at this time. Partly as a result of being a small company, and partly as a result of the civic lockout in the Interior of British Columbia. As a result of that lockout, B and E Refrigeration Co. Ltd. is not servicing ice arenas in the area. It is submitted to me that a five hundred dollar fine can be more serious to a small company than a fifty thousand dollar fine to a large company. With that proposition I agree. I am satisfied though, that my concern, at this time, need not be specific deterrents to B and E Refrigeration Co. Ltd. I would suspect the deterrence has already been met by the requirement of that company attending in court, the resulting publicity and the embarrassment of the act itself, would result in a deterrence to the company and the individuals operating the company. General deterrence is the matter that I must consider. I must not overlook though, that the company is small, and a fine so great that it is unable to be made or paid by the company, assists or deters no one.

In effect, Mr. Eddy is the company, if he leaves and decides to set up a new company, there's very little to stop him from doing that. Much of what I have heard in submissions today, in speaking to sentence--I shouldn't say much, but some of what I have heard today comes somewhat of a surprise, specifically that there was a difficulty last year of a similar nature. One can only determine the issue of guilt or innocence on the evidence at a trial; not submissions that are accepted later.

I have been provided some cases indicating various fines with regard to this type of offence. There is also another case that was referred to me by crown counsel, not on sentencing but on the issue of due diligence; it was the case of *Regina v. Campbell River Lodge Ltd.*, where fines of twenty five hundred dollars were imposed on a corporation and seven hundred and fifty dollars on an individual. In that case the individual had certain equipment siezed from them, I believe, the corporation was quite negligent. In my view, more negligent than B and E Refrigeration has been on this occasion. I'm taking into consideration the present financial position of the company, realizing that destruction to the resource can not be repaired. In my view the appropriate disposition is a fine of one thousand five hundred dollars.

NEW BRUNSWICK PROVINCIAL COURT

R. v. NEW BRUNSWICK COAL LTD.

HAZEN, Prov. Ct. J. Sunbury, May 13, 1987

***Fisheries Act*, R.S.C. 1970, c.F-14 as amended - Accused found guilty of one count under section 33(2), depositing a deleterious substance into water frequented by fish - Mining effluent into the East Brook and into the Little River - Defence of due diligence not established.**

Sentencing - Deterrence to others - Fine of $4,000.00 levied.

The accused was charged with one count under section 33(2) of the *Fisheries Act*, R.S.C. 1970, C.F.-14, as amended, depositing a deleterious substance into water frequented by fish. The accused, as part of its mining operations, pumped water that had accumulated in a large open pit that had previously been used for mining coal, through a pipe into a settling pond. From the settling pond, the effluent flowed into the South Branch of the East Brook and ultimately into the Little River.

The Crown relied on the results of pH tests performed both in the laboratory and on site indicating the following: the final effluent at the settling pond had a pH reading of 3.4 (lab results ranged from 3.2 to 3.6); at the diversion ditch the on-site pH reading was 5 (lab reading was 4.7); the East Brook had a pH reading of 3.5 (lab reading of 3.4) and the Little River pH reading was 4.8 (lab reading of 4.66). Experts testified that a pH reading of 5.5 or under causes trouble for aquatic life. It was agreed that very few species of fish can survive below a pH of 4, and generally, that a low pH would have a deleterious effect on any fish habitat.

The accused's evidence indicated that it had relied on tests from time to time from the Department of the Environment and that upon notification of the problem, steps were taken to stop the pumping and an engineer was brought in immediately to address the situation.

Held, the Court found the accused guilty.

The Court held that the tests results were reliable considering a defence witness's testimony that he saw no problem with the sampling procedures and given the credibility of the Crown's witness's. The results indicated that a deleterious substance had been deposited into the waters of the East Brook, which drained into the waters of the Little River.

The Court held that there was no evidence to show that the accused took any care, reasonable or otherwise to prevent the offence from occurring. The defence of due diligence was not shown to exist in this particular case.

The accused showed quite laudable conduct after this incident, in developing a testing procedure and spending two hundred and fifty thousand dollars on research and treatment, however, the Court considered deterrence to others to be an applicable sentencing principle. The fact that there was no evidence of damage to the environment was secondary, as the evidence suggested that actual damage could have occurred. The Court levied a fine of four thousand dollars.

Sharon R. Lockwood, for the Crown.
George T.Yeamans, for the Accused.

(Editor: The original transcript of the court reporter contained no paragraphing. The editors have provided paragraphing for the convenience of the readers).

HAZEN, Prov. Ct. J.

I've looked at many aspects of this. I considered at one stage quite frankly that one could have probably given a judgment in a very short period of time. But given the length of the evidence, the length of the trial namely three days, the number and quality of the witnesses and the submissions or the briefs that I felt that probably I should, out of fairness I think to counsel and to the defendant, give a lengthier judgment. I haven't really written it out fully because I found that it was taking -- going into great lengths but what I did do is make a number of notes and draw from the briefs from both counsels. And I might add I found them to be uniformly excellent. This was a, obviously a serious case. One of the comments I have heard in the news media which is that it constantly refers to thousands of dead fish but certainly anybody who sat through three days of trial there was no indication of dead fish nor was that what this charge is about. I think there was one dead fish and one dead eel somewhere but I just thought I'd say that off the top and I might add that counsel, both counsel, didn't press that point nor was that quite frankly the charge before the Court.

The charge before the Court and I'll just repeat it as much for my own benefit than anyone else's is that New Brunswick Coal Limited, which was -inaudible- the defendant and properly proved and the facts agreed to, having a registered office at P.O. Box 520, in the Village of Minto, County of Sunbury and Province of New Brunswick, on or about the 21st day of May 1986, did unlawfully deposit a deleterious substance or permit a deposit of a deleterious substance. To wit: effluent from their Fire Road mining operation having a depressed pH of 3.4, into the waters of East Brook which drains into the waters of the Little River, in the County of Sunbury and Province of New Brunswick, being water frequented by fish, contrary to Section 33(2) of the *Fisheries Act*, Revised Statutes of Canada, committing thereby an offence under Section 33(5) of the said *Fisheries Act* and amendments thereto. Now it's a pretty simply stated charge, and as evidence on deleterious substance, although this makes more sense as I go along, one of the Crown experts testified that a pH reading of 6 or over aquatic life would survive, and 5.5 or over there was no serious trouble or problem. But a reading of 5.5 or under, a pH reading, there was trouble. For instance, at 4.7, no Atlantic salmon could survive. And below 4, very few species of fish can survive. So that is foremost and that was agreed to virtually by all the experts. There was debate and cross-examination as to whether the rainbow trout which would come up later were a hardier fish than the brook trout and in fact it appeared that brook trout were a hardier fish. But nevertheless, I think it was well agreed to that a low pH would obviously have deleterious effect on any fish habitat.

Now, what this case evolved from was an operation by New Brunswick Coal, namely the defendant company and there were various names given to part of the pits and diversion and holding and so on, but I think it's easier to refer to as saying there was a large open pit and this open pit had previously been used apparently for mining coal. It was roughly one mile long, by a hundred feet across and eighty to ninety feet deep. From this open pit or diversion ditch, there was a pump and the pump was pumping water or a liquid from the open pit into what was known as a settling pond. And pictures of the settling pond were put in and that also was a rather long depression and airy. At the end of the settling pond, there appeared to be water discharging into a boggy area. The boggy area and I'll say more about it later but it became abundantly clear that the water flowing from the open pit through the pump into the settling pond was also going out and being discharged in the boggy area and from the boggy area it went to a number of the streams in question.

Now I didn't have any problems concluding that. There was no dye test run as there might have to be in certain areas where the water would disappear from sight. In this one, it wasn't or didn't present a problem to this Court to conclude that what was flowing out of the settling pond into the boggy area was ultimately reaching the streams in question. Now a number of tests were conducted in this area on or about May 21st. Tests conducted on site, subsequent lab tests conducted in the Halifax area on May 23rd, May 26th and May 27th and this is all in 1986, and by a Mr. Blenis on site on May 21st and also on May 22nd. It would probably be better to address the Crown's case first and then the Defence and then the law. The Crown witnesses included the following: a Mr. Phil Hennebury and a Mr. André Gauthier, fisheries officers, who together were responsible for all the on-site sampling on behalf of the federal department known as Environment and Protection Service. Then John Blenis, Fish and Wildlife Forest Management technician who did on-site sampling on behalf of the provincial Department of Natural Resources and Energy. Gordon Myers, a fisheries officer with the federal Department of Fisheries and Oceans, who gave evidence on the presence of fish in the South Branch East Brook, the East Brook and the Little River. Next, Wilfred Pilgrim, a field technician with the Environmental Services Branch of the provincial Department of Municipal Affairs and Environment, who basically acted as a guide to Mr. Hennebury and Mr. Gauthier and gave evidence as to the particular physical locations, the various sites which were identified on Exhibit P-1 which I have here as well as speaking to distances between the various sites. Then Mr. William Horne, an inorganic chemist who was admitted as an expert witness in his field, who gave opinion evidence on the proper procedure to take pH readings as well as spoke to existing and acceptable laboratory testing procedures including opinion evidence on the interpretation of results. David Vaughan, a laboratory technician of fifteen years experience with the Aquatic Toxicology Laboratory, who gave evidence of laboratory pH and bioassay test results and more about them later. And finally a Mr. Roy Parker, an aquatic toxicologist admitted as an expert witness in his field, who gave opinion evidence on the testing procedures, meaning and significance of pH reading and bioassay results. So those were primarily the Crown witnesses.

The elements of this offence are pretty well spelled out from the charge. The first part, namely "New Brunswick Coal Limited on or about the 21st day of May 1986" and it was admitted that New Brunswick Coal was a body corporate duly incorporated under the laws of this province and in fact there was no argument made as to the fact that it was their site and they were doing the work on it. This was later corroborated in cross-examination by the witnesses for the Defence. The second is "did unlawfully deposit". And the word "deposit" is defined in section 33(11) of the Fisheries Act to mean, quote: "any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing". I'm not sure how many of those things qualify here but I've come to the conclusion given the normal meaning there is no doubt whatsoever that the water from the open pit through the pump into the settling pond eventually was deposited either -- at least by leaking, seeping, pouring, emitting, emptying into the bog.

The evidence of Crown witnesses who were present at the Fire Road mining area for the purposes of collecting samples identified what appeared to be the effluent as being pumped from the water which had accumulated into the mine's open pit through a pipe to what was referred to as a settling pond. The Defence witness, Mr. Cormier, did under cross-examination confirm that employees of the defendant on the date alleged did in fact pump effluent from the open pit through a pipe across the Fire Road to a settling pond. Section 33(8) of the Fisheries Act holds a defendant company liable for the acts of its employees. Crown witness, Mr. Blenis, he testified that he followed the flow of the effluent from the settling pond, which was identified on Exhibit P-1 as site A, to the South Branch East Brook. Mr. Blenis testified that following the flow of water from the intersection of the settling pond's stream and the South Branch of the East Brook, he walked south beside the said brook to where the North Branch of the East Brook and the South Branch of the East Brook merged into a flow of water known as the East Brook. Mr. Blenis further testified he followed the flow of water down the East Brook to a spot identified by him on Exhibit P-1 as site D and he also indicated he was familiar with this area and I had no doubt whatsoever after listening to him where the water ran and where it ran into without the need of a dye test I must say, evidence from other witnesses alone, I had no doubt whatsoever as to where this water flowed to. And subsequent tests I think will disclose I'm correct in my finding. Mr. Blenis went on to testify that in his experience as an employee of the Department of Natural Resources his responsibilities cover the river systems in question. He stated that he had personal knowledge that the East Brook empties or drains into the Little River.

Next is "a deleterious substance having a depressed pH of 3.4." Now the term "deleterious substance" is defined in section 33(11) of the Fisheries Act, to mean:

> "a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water",

and there was a b) section:

> "any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation of alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water".

I do recall I think in cross-examination a question to the effect that if one were to urinate in a brook, it may well have that effect and I must say given the breadth of the definition Defence may well have been right -inaudible- but certainly for the purposes of this case I just mention it. Deleterious is defined by Webster's Third New International Dictionary to include in its descriptive definition the words hurtful, and destructive or quote: "whatever has a harmful effect often in a concealed or unguessed way".

I think in this particular case the primary test used to determine whether or not the effluent was deleterious was by determining the pH level of not only the effluent at the point of discharge but at various sampling sites where the effluent had been diluted with the waters of the South Branch of the East Brook, the East Brook and the Little River. And this would be abundantly clear. For instance, if where the effluent was going into these streams, if below that the pH reading was below the trouble level, namely of 5.5, whereas if above it on the stream the readings were 5.5 or over it would not be hard to conclude two things. One, that what was coming from the settling pond was going into these streams; and two, that if the pH readings were below 4.7 for instance that it would have been a deleterious substance. A summary of the various testing sites by three of the Crown witnesses would indicate as follows: the final effluent at the settling pond, namely this is where it comes out, Mr. Gauthier in an on-site test indicated that the pH reading was 3.4. Mr. Vaughan in a lab test indicated over three various days, 3.2, 3.4 and 3.6. But he did explain why those readings would vary slightly. At the diversion ditch, Mr. Gauthier had a reading of 5, Mr. Vaughan's reading was 4.7 and Mr. Blenis doing the on-site test also along with Mr. Gauthier, a separate test, came up with the reading of 4.7. The Little River at the Highway Number 10 bridge, Mr. Gauthier had a reading of 4.8, Mr. Blenis a reading of 4.66. Finally in the East Brook, Mr. Gauthier had an on-site reading of 3.5, Mr. Vaughan in his lab test had a reading of 3.4.

Now, quite clearly the pH was substantially altered at that level. Mr. Gauthier and his companion indicated that when they did the tests and then when they took a number of pails of water back to Halifax for testing, it was not for the purposes of prosecution. This was a normal way of handling the water and the various pails and Mason jars. Although I have come to the conclusion after hearing all the evidence, including that of the Defence, that tests conducted by Mr. Vaughan in the lab, by Mr. Gauthier on site and by Mr. Blenis in site were perfectly correct and proper. A great deal of time was spent on cross-examination of them and I've no difficulty with that because certainly if their evidence stood up then it would put the Defence in a rather precarious position for the purposes of a potential conviction. So they were examined and examined at length but I must say that subsequent experts called by both the Crown and the Defence indicated that the tests from what they had heard were done quite properly and quite correctly. As a matter of fact, the first witness for the Defence, a Mr. Phinney, indicated that he had no problem with Mr. Blenis's measurements, Mr. Gauthier's were acceptable, and there was no problem with Mr. Vaughan's tests. Now there was a great deal of time and energy spent in cross-examination as to the continuity, as to whether the pails were clean, as to whether the Mason jars were clean, as to whether more fish should have been used in some of the tests done in Halifax and so on. But I must say after reviewing the evidence as a whole, I have concluded beyond any doubt that the tests were done according to proper standards and the readings obtained from them I might add consistently throughout remained within a proper measurement of each other. So that in effect I've taken based on the evidence the pH tests as being accurate. I could go at length into how the testing was done on-site and in the lab but I really do think, -inaudible- reading of the evidence which I did and which I heard, leaves me to conclude as I say beyond any reasonable doubt, the readings in fact were accurate.

Now I think one should look at the readings beyond which I've mentioned and these were taken by Mr. Blenis on the day in question, namely May 21st, 1986, along with the previous four mentioned readings, we find that the East Brook, twenty feet from the Little River, there was a reading of 3.43. From the discharge at the pipe, we find a pH reading of 3.01. On the South Branch of the East Brook at the Fire Road which according to Exhibit P-1 and the evidence would have been above where the effluent was running in, the reading was 6.33. And clearly according to the evidence given by the experts, this was perfect or would have been perfectly all right for aquatic life survival. But that was at site G above where the effluent was running in. Site H, the North Branch of the East Brook at the Fire Road, once again outside the general area, a 5.4 one. But site I, namely twenty to thirty feet below station A, namely the settling pond and the bogs, was 3.27. Site J effluent in the stream twenty feet before intersection with the South Branch of the East Brook, once again where the effluent would have been travelling, 2.97. A subsequent test, and this is all within a few hours of each other, was done by Mr. Blenis and it showed that on the South Branch of the East Brook twenty feet above where he concluded the effluent was entering the stream there was a reading of 6.23. Once again, allowing one to conclude; one, that the water above where the effluent was coming in was perfectly all right and acceptable; and secondly, that whatever was coming in from the settling pond and through the bogs was obviously unacceptable. Site L, South Branch of the East Brook, twenty feet below the effluent stream intersection, 3.43. So there we have a distance of forty feet but a reading above of 6.23 and below of 3.43. Site M, the Little River, fifty yards above the intersection of the East Brook and the Little River, once again in what would be water which was not susceptible to the effluent, a reading of 6.41. And finally, site N, the Little River at the power line, in this case he did both sides of the river. On one side, he found a reading of 3.98, on the other side a reading of 4.67. So the evidence at least in that I've found to be once again conclusive.

The Crown witness, Mr. Vaughan, did a lab test on water taken from a number of sites, to be specific the final effluent at the settling pond, the diversion ditch, and water taken in the East Brook, without going into too much detail which Mr. Vaughan went into a great deal of detail because it was necessary to the Crown's case and was examined lengthly as to proper testing procedures and what not, ran a number of tests in which, and I might indicate that this is the only place during three days of trial where any fish did die but mind you they were for test purposes. There was argument as to whether five fish should have been put in each tank for test purposes or ten, but I must say I did find the conclusions that Mr. Vaughan reached to be quite realistic and consistent with the evidence he gave and a strong cross-examination is an excellent thing in a court of law because it will bring out in fact any weaknesses in the evidence given by a witness. But alternatively, if a witness holds up under a strong and forceful cross-examination, it does add a certain credibility, a likelihood of correctness to that witness and I had found Mr. Vaughan in fact did hold up.

In the diversion ditch, he found that it was not completely lethal, that at a 100% of the water taken out from it, that there was not that great a problem. The two areas where there were problems though was in the final effluent and then downstream. And the final effluent at a 100% of the water taken from that area, he found that there was 100% mortality of the fish used in the sample. And this was within eighteen and a half hours. As a matter of fact, my recollection is that he said they probably died within an hour or two but he wasn't there to watch them because he left them over the evening. At a 32% concentration, he found there was 100% mortality rate in eighteen and a half hours. And that at a 10% concentration, namely the water taken from the final effluent area mixed with 90% good water, he found there was still 100% mortality rate in eighteen and a half hours. The water taken from downstream once again where the fish were put in the tank, and I might say he explained at length how they took normal water with a pH reading of 6 or above and the fish were all alive after the eighteen hours. Then he took the water from downstream, put it in a tank at a 100% solution. He said there was 100% mortality rate within eighteen and a half hours and once again he thought that they had died in just a few hours. At a 32% solution, there was a 100% mortality rate in eighteen and a half hours. And at a 10% solution, a 100% mortality rate in eighteen and a half hours. Now argument was made as I indicated before that the fish used for the tests in these samples were in effect rainbow trout fingerlings or something of that nature, and that brook trout were hardier. But nevertheless, based on this evidence which is cogent and clear, and the evidence given by the witness Mr. Vaughan, in both direct and cross-examination, I have no doubt concluding that and at least in his opinion it would have been almost equally as hazardous, and with as equally a high mortality rate had they been brook trout.

It is abundantly clear that the legislation set out in the Act with which we're dealing with does not require proof of actual death of fish in order to prove that the water is deleterious. However where a bioassay test results in dead fish, which are the tests I referred to here, it merely confirms the experts' opinion that the effluent was deleterious. In *R. v. Chew Excavating Ltd. et al*, from the B.C. Provincial Court, 2 F.P.R. 163 at page 166, it says: "The question here, in my respectful view, is not what happened, that is to say, whether any fish were killed... but whether when it went into the water the silt was a deleterious substance." In that particular case, they were dealing with silt. The activity was held in that case to be unlawful and a guilty finding was held against the company for the acts of its servants. The leading case, and it was referred to by the Crown, but another case involving the same company was mentioned by Defence, *R. v. MacMillan Bloedel (Alberni) Limited*, (1979) 47 C.C.C. (2d) page 118, the British Columbia Court of Appeal, and leave to appeal to the Supreme Court of Canada was refused, the Defence raised that oil by admission was a deleterious substance and by admission was deposited, the waters after such deposit were not rendered deleterious due to quick clean-up operations by the defendant company. In finding the company guilty and in clarifying the statutory definition of a deleterious substance the court stated at page 121: "What is being defined is the substance that is added to the water, rather than the water after the addition of the substance."

In the case before this Court, Mr. Blenis testified that he sampled the effluent at the end of the pipe and found a 3.01 pH level reading. The suggested defence that possibly the cranberry bog in the area of the settling pond could cause depressed pH levels at that stage became meaningless. Because certainly if it's 3.01 before it goes into the bog, one couldn't conclude that it was the bog that was changing it and lowering the pH. The Crown must prove only that the substance at the time of deposit, namely at the end of that particular pipe, is deleterious. Any evidence lead as to pH levels at various points along the flow of waters from that point on, namely the point of discharge, merely supports in what could be characterized as overwhelming fashion a submission that in fact the effluent at the point of dishcarge was deleterious. It just confirms it as it goes on down the stream. Further evidence given to tests done on nearby brook waters not in direct flow of line from the discharge pipe indicates those waters to be of acceptable water quality and by expert witnesses evidence to be suitable for fish life. The two expert witnesses called by the Crown, both gave evidence that any apparent variances of pH level readings at the various sites by the various witnesses at different times were completely acceptable because they explained that there could be a difference in some instances of .1 and another but looking at them whether they were done on-site by Mr. Gauthier, Mr. Blenis's are in fact done in the lab. The level of the readings were consistent to confirm the fact that the tests were done appropriately and properly.

"Waters frequented by fish" is something else that must be looked at and that's defined in section 33(11) of the Fisheries Act to mean "Canadian fisheries waters". The latter is specifically defined in section 2 to mean "all waters in the fishing zones of Canada, all waters in the territorial seas of Canada and all internal waters of Canada". I've come to the conclusion that each of the brooks addressed during the trial were Canadian fisheries waters being internal waters of Canada and thus subject to the *Fisheries Act*. One can see that by looking at the evidence of Gordon Myers, John Blenis and Wilfred Pilgrim. Thus it is not incumbent on the Crown to establish the actual presence of fish in the various brooks. Rather, the obligation would be upon the Defence to show the water is not so frequented. Section 33.4(3)(b) provides: "No water is 'water frequented by fish' as defined in subsection 33(11) where proof is made that at all times material to the proceedings the water is not, has not been and is not likely to be frequented in fact by fish". As a matter of fact in this particular case before the Court, there was evidence given by one of the witnesses that he went fishing there June 3rd and 4th, he wasn't clear on the day, and I think he caught something like 27 fish at that time although it remains open as to whether he kept them all or not. I suspect not. Crown evidence was given by Gordon Myers that as a fisheries officer his jurisdiction includes the brooks in this area and that fish life there included trout, salmon parr, chubb, eels, suckers, etc. Crown witness Wilfred Pilgrim gave evidence that he caught fish in the Little River in June of 1986, which is the gentleman I just referred to. No evidence was led as to whether the mine was in operation at the time of this fishing nor whether the fish had come down river from the East Brook or were newly entered fish, but in any event it did once again confirm the fact that these are waters where fish frequent.

Now as to the Defence, the Defence raised a number of technical points among other things on the various tests, the pH done in the stream, and went into it in depth, but as I have indicated I'm more than satisfied that the tests were properly done. As to the continuity, while it did show clearly that there were, I'm not sure the proper word would be mistakes made, but that it was not handled perhaps as correctly as it should have been. However, expert witnesses for both the Crown and the Defence indicated from what they saw that there would really have been nothing that would have changed appreciably the pH readings. Mr. Keith Phinney, one of the witnesses for the Defence, indicated and I must say I appreciated the candor quite frankly by Defence witnesses, there was no effort to cover up or anything of that nature. They gave -- they took the stand and gave the evidence in a perfectly straight-forward fashion and one does not always see that in court, indicated the settling pond was probably not an adequate way to treat low pH, that he had no problem as I indicated before with the evidence of Mr. Blenis, Mr. Gauthier and Mr. Vaughan as to how they did the tests. Mr. Gregory Gillis, an expert in aquatic biology, gave evidence as to the readings on pH. He said there can be a plug of low pH water can go through in a natural system. But in this particular case, he couldn't give an opinion as there was nothing to show the water bodies were completely mixed. On cross-examination, he did indicate though that he agreed completely that a pH of 3.4 or anything that low would definitely trigger concern.

And finally for the Defence, there was Mr. Andrew Cormier, the president -- general-manager of New Brunswick Coal Limited. He indicated that they really had not done tests, that they relied I think it was on the New Brunswick Department of Environment and that, I think he had a memorable line in there that said he didn't know and he'd sat throught three days of trial that he certainly knew nothing about pH when he came in, but certainly knew a lot about it when he left the Court. And I would echo his sentiments quite frankly. But in any event, he indicated that there really hadn't been that much concern, that the Department of Environment was, he thought, had been testing and I must say that there had been to him no indications to stop but on May 30 -- on May 23rd, following the tests on May 21st that when he got a call that there was a problem of low pH from the environment and was asked to stop the pumps, that he shut them down immediately. Now the reason I state this is as to whether it comes up in the Defence, it was raised by the defendant as to if this is a strict liability offence. I've had an opportunity to read both briefs and I've come to the conclusion that it is a strict liability offence and that the defence of due diligence would in fact apply. It remains to be seen as to whether defence of due diligence was effective in this case.

Subsection 33(2) of the Fisheries Act is not a mens rea offence. In *R. v. Churchill Copper Corporation Ltd.*, 1971, 4 W.W.R. at page 481, the Provincial Court Judge, categorized this as a strict liability offence. Section 33.4(3)(a) of the Fisheries Act provides as follows: "For the purpose of any proceedings for any offence under subsection (1) or section 33, a 'deposit' as defined in subsection 33(11) takes place whether or not any act or Commission resulting in the deposit is intentional." The best known case quite frankly on this matter is *The Queen v. Sault Ste. Marie,* which Mr. Justice Dickson, and I won't bother citing the case, it was mentioned in both Crown and Defence briefs, "There are three categories of offence", and the second offence which is what we're dealing with here I conclude, "offences in which there is no necessity for the prosecution to prove the existence of mens rea", namely mental intent,

> "the doing of the prohibited act prima facia imports the offence leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or ommission innocent, or if he took reasonable steps to avoid the particular event."

By case law, due diligence is defined as meaning precaution and prevention, not correction after the fact, to compensate for an action already taken. The test is whether the defendant did all that a reasonable, in this case, mining company would do in the circumstances to avoid any outflow of effluent that would be toxic to fish habitat.

The company admitted in this case to ignorance but that is obviously not a defence. The incident was not an accident, which may or may not have been a mitigating factor. There was a pump pumping from the large holding pit out into another body of water and that body of water, the water was escaping into the bog and into the streams. There was no evidence of any effort to monitor or maintain treatment facilities prior to May 21st, 1986. It would theoretically be open for the defendant to exculpate itself from liability by showing on a balance of probabilities that it had exercised all reasonable care in the circumstances. But the evidence indicated that in fact aside from relying from the tests from time to time from the Department of Environment, there was no evidence to show that the company took any care, reasonable or otherwise, to prevent the offence from occurring. *R. v. Crown Zellerbach Properties Ltd. et al* 3 F.P.R. 84 held where there is not an inspection system in place and where the accused did nothing to control quantities discharged, there can be no defence of due diligence, and found the company guilty. In *R. v. Canada Tungston Mining Co.* 1 F.P.R. 75 the Supreme Court of the Northwest Territories quoted with approval from the decision of *Sweet v. Parsley* 1970, A.C. at 132:

> "Where the subject matter of a statute is the regulation of a particular activity involving potential danger to public health, safety, or morals in which citizens have a choice as to whether they participate or not, the court may feel driven to infer any intention of Parliament to impose, by Penal Sentence, a higher duty of care on those who chose to participate and to place on them an obligation to take whatever measures may be necessary to prevent the prohibited act without regard to consideration of cost of business practicability." So I have looked at the due diligence defence and I must say I find under the circumstances that while such would be a defence to a strict liability offence, it was not shown to exist in this particular case.

Another argument of the defence was there was no proof of inspector designation. But I've come to the conclusion that Mr. Hennebury and Mr. Gauthier when they testified they were authorized designated inspectors under the authority of the Fisheries Act as likewise Mr. John Blenis testified as to his mandate; that: "Oral testimony is sufficient to raise a rebuttable assumption of due appointment." See *R. v. LeBlanc* 7 C.C.C. (2d) at page 525 and also a decision in *R. v. Ogilvie*, the New Brunswick Court of Appeal, 4 C.C.C. (2d) at page 178: "There is a presumption a person acting in the capacity of a public officer has been properly appointed and such presumption can only be set aside by evidence to the contrary and not by merely challenging the appointment." So I do find that in fact there was proper designation of the inspectors.

Various subsections of section 33.2 deal with the legislative procedure to be followed in conducting on-site inspection. There is reference to reasonable grounds but it refers not to whether an offence has occurred or is occurring, rather to whether or not a person is carrying on or undertaking that: "is likely to result in the deposit of a deleterious substance." That was certainly shown to be the case here. The low pH, I'm just trying to cover defence points, created by the bog. As I've indicated before when you have coming from the tube a 3.01, I certainly think it mitigates against the bog being the main culprit in this. And finally one further comment on inadequate sampling procedures. When you have the witness -- a witness for the Defence indicating that he saw no problem with them, I certainly don't think it's open to the Court to find any problem either. And I must say I would conclude the same as he did that they were done properly. So obviously after taking the time to consider and re-read and re-read all the evidence and having heard it, I've come to the conclusion that it is proven beyond any reasonable doubt that there was a deleterious substance, that it was deposited into the waters of the East Brook, which drain into the waters of the Little River in the County of Sunbury, Province of New Brunswick, that these were waters frequented by fish, and that New Bruncwick Coal did deposit these deleterious substances. Therefore the company is found guilty.

SENTENCING

Well, I have to look at a number of factors here. It's rather strange because when sentencing an individual, one has a number of principles to go by. Presumably they would apply to corporations equally but some of them may not make sense. The first is punishment or retribution. That's been frowned on as a principle of sentencing in any event and it would not apply or appear to apply in this case. There was no indication of any overt act or something done deliberately knowing what would happen or the bad results of it. Secondly is, once again looking at individuals, rehabilitation or reformation. Well I suppose one can apply to a company and I must say in this particular case, the evidence given by Mr. Cormier, he indicated as Defence pointed out and as I recall that the tests were done on May 21st, 1986. The minute the results were known the company was made aware of them and the company immediately shut down their pumps. So at least that shows that -- and to further complement that action it was indicated that within a couple of days they hired an expert who now does testing every half hour, in half hour frequencies at a pump and at the final discharge. So that's been done. The company in effect has reformed itself. And finally up to the stage of the last day of the trial, two hundred and fifty thousand dollars had been spent on research and treatment. There is no question in this particular case that New Brunswick Coal has acted and appears to have acted promptly on what was brought to their attention.

But thirdly there is a deterrent both to the company and to others and certainly when one sees what the company has subsequently spent to correct and prevent -- to correct that abuse and to prevent any further ones, I'm really not interested in deterring New Brunswick Coal. They seem to have accepted it and deterred themselves. But there are others. There are other companies out there. And of course the last and the paramount thing in sentencing really is in a criminal thing, it would be protection of the public. In a quasi-criminal thing which this is, it's basically a protection of the public and society. And I must say the comments made by the Crown in some of those cases, I think really call it to the attention of the Court because New Brunswick depends, depends to a great deal on our natural resources. And part of those natural resources are streams and the fish in them quite frankly. The company in this particular case showed subsequent good conduct and really quite laudable conduct after this incident. Leading up to it, there's nothing to indicate there was any warning given or ever given and that in fact it was an error.

Unfortunately, in the view of this Court, it was an error that shouldn't have happened. And one of the reasons for the conviction was the lack, the due diligence thing. When you have an area which is handy to streams and as can be seen from Exhibit P-1 in this particular case, there are a number of streams and brooks in that area, all flowing into bigger ones, and they all flow into bigger ones, and while this appeared to have been stopped very quickly, the question is should it have ever happened. And when one looked at the exhibits, namely the big pit, that seemed to be able to hold the water, but the settling pond, and I can recall the exhibit, certainly wasn't too sturdy in any nature and then the effluent was discharging right into the bog. And while it wasn't done deliberately or on purpose, it's the sort of thing that shouldn't have occurred. And I do think that really in this particular case, there's only one reason for sentencing and that is really to deter others, to have other similar companies, and regardless of size, take a look and find out that if they're in an area where there are streams, where it's vital and important to protect the environment, that they look at that and they consider it before they take any action. So having looked at the sentences that have been imposed in other cases, and I must say I do agree with the Crown in the *Equity Silver* one, the Crown I find has been fair, as the Defence, but I do find that whether or not there was actual damage, and in this case there was nothing to indicate actual damage ever shown during the trial, but that is in fact secondary. Actual damage could have occurred. I recall one of the witnesses saying that certainly the low pH could kill fish and it could be a plug, namely something done by nature, it could just go down the river and nothing would happen, but the important part would have been not only the low reading but the length over time of the reading. The amount of volume of deleterious substance going into the river and the continuation and if something hadn't stopped, if it hadn't been tested for and continuously as they're doing now, that theoretically would it be possible to wipe out an area and I think that's only common logic and I do think it incumbent upon corporations to look at their operations and to ensure that something of this nature not only won't happen again, but in fact should not happen in the first place. There was a certain lack of consideration.

This isn't the most serious case in the world but it's far, far from being a trivial case. But the fine itself I do think should be such as to one, deter others from putting themselves in a position like that; and secondly, if there are other companies out there that are in fact near waterways and streams, that they look at their operations and consider as to whether any of their operations are in such a situation that deleterious substances could in fact go into our natural waterways because they are our natural resources. Therefore, I intend to impose a fine consistent with the one that I took to be the closest to the case before the Court, namely Equity Silver, in that case there were three charges, in this there is just one charge, and I intend to impose a fine of four thousand dollars, in default of payment an execution against goods and chattels.

BRITISH COLUMBIA PROVINCIAL COURT

R.v. NORTH ARM TRANSPORTATION LTD.

GREEN, Prov. Ct. J. March 17, 1983

***Fisheries Act*, R.S.C. 1970, c.F-14, as amended - section 33(2) - Depositing a deleterious substance into water frequented by fish - oil near Hecate Bay - due diligence defence rejected - Accused convicted - $15,000. fine levied.**

The accused was charged with depositing or permitting the deposit of oil, a deleterious substance, into water frequented by fish, contrary to section 33(2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended. The company's Transporter Number 6 barge, towed by its North Arm Highlander tug, ran aground between two islands near Hecate Bay off the west coast of Vancouver Island. The barge was on the west coast fuel run carrying diesel and gasoline from Chevron's Burnaby refinery and offloading at various logging camps along the coast. When the barge was finally beached at Hecate Bay, Fisheries Officers arriving to inspect observed a fairly consistent film of oil through the entire Hecate Bay area and spreading into Cypress Bay and the Yellow Bank area - areas important for salmon and herring fisheries. The issue was whether a serious marine accident was unavoidable, given the unusual hazards with seagoing tugs and barges, or whether the corporate accused's employees had been negligent.

Held, the accused was convicted.

The Court held that the corporate accused's employees had been negligent. The Court found that the barge ought to have survived the grounding without fuel escaping but it was not in adequate seaworthy condition. Diesel was displaced because, when the stem was flooded, sea water entered a fuel tank which was not composed. The cap could have been dislodged while machinery was moved on the deck; the bargeman was negligent for failing to ensure that this didn't happen. The company had not devised a system to ensure proper maintenance and checking during loading. The company was fined $15,000. An appeal was dismissed for want of prosecution.

D.R. Kier, Q.C., for the Crown.
D. Hobbs, for the Accused.

GREEN, Prov. Ct. J.

The accused corporation in this case is charged in an Information sworn on January 22nd, 1982 with a violation of section 33(2) of the *Fisheries Act* alleging that:

> Between the 15th day of February 1981 and the 24th day of February 1981, at or near Hecate Bay, in the Province of British Columbia, it did unlawfully deposit, or permit the deposit of a deleterious substance, to wit, oil in water frequented by fish.

To this Information the accused corporation pleaded not guilty and a trial was held in respect of the charge at Port Alberni on the 10th and 11th days of June, 1982 and at Nanaimo on the 4th day of November, 1982.

Evidence adduced established that a barge owned by the accused called the Transporter Number 6, and being towed by a 74 foot tug also owned by the accused, called the North Arm Highlander, was run aground on the beach in front of a logging camp in Hecate Bay, on the west coast of Vancouver Island on February 15, 1981.

The tug and barge were on what is termed the west coast fuel run and was carrying fuel oil products below decks and logging and other equipment and cargo on deck and in the course of this voyage would call in and service various logging camps on the west coast of the Island.

The barge was designed to be capable of carrying two different types of fuel, diesel and gasoline, and had two separate systems to handle and discharge these fuels. The barge was divided into different compartments, some containing fuel and others merely for housing machinery such as pumps, valves, and machinery for loading and discharging the fuel. The stern six feet of the barge across its complete width was separated by a bulk head from that portion of the barge where the fuel was carried. This was where the machinery was located. This area was called the floatation compartment and the port side occupied one-third of the width and the starboard side two-thirds of the width. Access to these compartments was through hatches which were covered by hatch covers which were designed to be bolted down and sealed when underway. Each fuel tank had an access pipe called an ullage pipe used mainly to gauge the amount of fuel in the tank. This pipe was covered by a brass or steel cap called an ullage plug, or cap, which was threaded and designed to fit tight and be sealed when a proper gasket was fitted.

The barge was loaded with fuel from the Chevron refinery in Burnaby called Stanavan. We heard evidence from the bargeman who supervised the loading of the fuel from this facility. He said that he checked all the fuel compartments, ullage caps and hatches as part of his duties before the barge left to be loaded with deck cargo at another dock.

The barge was then taken to the Arrow Transportation dock in the north arm of the Fraser River where cargo in the form of equipment was loaded on its deck.

We heard evidence from another bargeman, called Mr. Berry, whose duty it was to discharge the fuel from the barge and supervise the loading and unloading of machinery and equipment on and off the barge.

When Mr. Berry assumed his duties the barge had already been loaded with fuel and its deck cargo. He inspected the barge visually, he said, before it commenced its voyage. This consisted of going around with a flashlight and checking the ullage plugs to make sure, as he put it, "everything was in shipshape."

He said that it wasn't possible to check all the ullage plugs on the barge because of the machinery that was on deck which covered some of the plugs, but he said that he saw approximately eight of them. He also said that the hatch covers also looked in fairly good condition, each had at least two lug bolts on them.

The tug with the barge in two left on its voyage at 7:30 p.m. on the evening of February 14th, 1981. The course followed was down the Strait of Juan de Fuca, around the south-end of Vancouver Island, up the west coast into Barkley Sound and the first port of call was at a logging camp at Green Cove in the Alberni Canal where some of the diesel fuel was off-loaded. In order to do so Mr. Berry said they went down into the compartment at the rear of the barge to open valves and start the motor to discharge the fuel. He said he found nothing untoward with respect to the hatch cover in this compartment at that time.

The next port of call was at another logging camp, a small log booming operation at Coleman Creek, which was located farther down the canal. There some logging equipment was loaded on the barge. No fuel was discharged. The items loaded included logging trailers and a shack which were placed on the barge with a self loading logging truck. The existing equipment on the deck of the barge had to be shifted and moved around in order to accommodate some of this additional cargo.

After this additional load was placed on the barge the stern was down to about one foot of freeboard.

After leaving Coleman Creek they then proceeded down the Alberni Inlet toward the eopen ocean to reach their next destination which was Hecate Bay.

They got to about six miles off Cape Beal in the mouth of Barkley Sound and found that weather conditions were adverse so they turned around and went back to shelter at a place called New Kildonan. There they tied up to some log booms and waited for better weather for the better part of Sunday, February 15th.

Shortly after supper on that same day they set course to leave Barkley Sound again by way of Ucluelet. In the vicinity of midnight they had reached a point off Amphritite Point when the captain of the tug turned over his watch to the first mate. He instructed him to set a course which would bring them between two islands, Stubbs and Wickaninnish, to avoid going outside and hoped to reach Hecate Bay by 0600 hours that morning.

At 0410 hours the barge went aground between these two islands. The captain of the tug said the barge went aground because it had flooded in the after compartment altering the draft and causing it to be much lower in the stern hence the grounding.

The captain alerted his superiors and they arranged for a tug, the Surrey Guardian, to go out to them from Tofino. The tug picked up the bargeman and it circled the barge during which time they assessed the damage.

The Department of Fisheries and the Coast Guard were also notified. The captain became concerned about the safety of the barge and contents and determined that he should try to get to calmer waters as the tide rose. He was told by the traffic control to go to Hecate Bay and beach the barge there rather than in the Yellow Bank area which he considered earlier.

As the tide rose he towed the barge off the ground and took it to Hecate Bay where he turned it over to the tug, Surrey Guardian, which pushed the barge onto the beach.

Fisheries officers Smiley and Hebrun arrived on the scene at Hecate Bay at about 1:55 p.m. on Monday, February 16th, 1981 on board the fisheries patrol vessel Laurier. They had come from Tofino which was seven miles south of this bay.

They first noticed oil in the water at a point some five miles south of Hecate Bay and observed that the oil film on the water was a fairly consistent even film spread out through the entire Hecate Bay area and was spreading into Cypress Bay and the Yellow Bank area.

These areas, according to Fisheries Officer Smiley, are important areas for the salmon and herring fishery.

After an oil boom was placed around the barge the fisheries officer went aboard it and took some samples of what they considered to be diesel fuel leaking from the barge and from the area of water in Hecate Bay surrounding the barge.

When they went on board the barge, initially it was on the beach, but sunk by the stern and they made some observations as to its condition. Namely:

(1) On the port side - at the stern most tank oil was leaking from underneath the ullage cap and all around the pipe underneath the seal. Oil was observed flowing from this area into the waters which was within the containment boom.

Fishery Officer Smiley observed that this particular ullage cap was not as secure as it might have been and that it had not been tightened down to its maximum potential and the rubber seal was not making a very strong contact with the top of the pipe.

(2) On the port side of the barge the second tank from the stern was full of water right to the level of the ullage cap. This was above the level of the ocean. There was no cap on this pipe, but an ullage cap was found lying on the deck about one foot from the pipe. The condition of the pipe and the cap appeared to be quite poor in that the threads on them were quite corroded. On February 21st this officer tried to tighten this cap on the pipe and found that it was impossible to do so because the threads were too badly stirpped and corroded to make any kind of a seal. He said the condition of the pipe and threads had not changed from February 16th when he first observed it.

(3) On the starboard stern - the metering manifold located there was leaking fuel out of the hose connection attachments. He observed a slow but steady flow of oil of approximately one-half gallon a minute from this area and because the stern was submerged the oil flowed out directly onto the surface of the water in Hecate Bay which was within the containment boom surrounding the barge.

(4) This officer also noted that the middle stern ullage cap and filler pipe of the barge was seeping oil as well. He said although this area was partially submerged the pipe appeared to be cross threaded and was not tight.

On Saturday, February 21st, the pumping off of the fuel into another barge commenced and was completed on the following day, Sunday, February 22nd. Fisheries Officers Smiley and Hebrun were present during this time. As the fuel was discharged the stern of the barge gradually rose and Fisheries Officer Smiley said that he was able to inspect the hatches and hatch covers at the stern of the barge after they broke the surface of the sea. He made these observations:

(5) One floatation chamber hatch was located outside the stern wall and on the starboard side of the barge. It was to provide access to the floatation and collision bulkhead. The hatch cover was designed to be secured by four wing nuts to provide a water proof seal. On examination of this hatch and cover it

was found to have only one wing nut and one square nut securing the cover. The other two nuts were nowhere to be seen on deck. Fisheries Officer Smiley tried to make the hatch cover meet the hatch combing to make a secure water tight connection, but was unable to do so because of a twist in the metal of either the cover or the combing.

(6) He made an observation, that is Fisheries Officer Smiley, made an observation of the port stern floatation chamber which was only seen on February 21st when the stern broke above the water line. This hatch had only one missing wing nut and was in better shape than the starboard tank in that it was possible to make a water tight seal when closed.

On February 17th, the following day, the barge was shifted from its initial location on the beach in order to take some of the stress from its bottom. It was placed at a spot where there was a more gentle slope to the beach and more support for the total length of the barge. On Feburary 18th a ramp was constructed to aid in the off loading of the equipment on the barge.

Captain McBirney, the Master of the tug which was towing the barge, went onboard the barge in Hecate Bay after the fuel had been pumped off to assess the damage. He found that a skeg under the starboard side of the barge was folded over at a forty to forty-five degree angle and there was a tear in the hull of eight to ten feet in length and about a foot wide. The effect of this damage would be that the starboard floatation chamber which occupied two-thirds of the starboard stern would become flooded.

In due course the barge was towed back to McKenzie Barge and Marine Way in North Vancouver for repairs.

Mr. Wray, the officer manager of McKenzie Barge and Marine Ways gave evidence in this case. His firm had been doing business with North Arm for some thirty years. He was able to say that these oil barges are brought in for repair and his firm had instructions to go over the whole structure and repair or replace that which was needed. In particular he said it was a fairly common thing to repair or replace ullage plugs. On January 16th, 1981, for example, two men from his firm went over to the barge when it was at the Standard Oil Refinery and took out two cross threaded ullage plugs and fitted two new ones.

I also heard the evidence of the manager of North Arm, Mr. Stradiotti. From him we learned that the accused firm has been involved in transporting fuel and equipment to logging camps up and down the B.C. Coast since the early '40's. They have been handling Chevron Products since 1957 and own some ten barges in all. He said these oil barges undergo an annual survey and are repaired as required. They have their own dock and repair facilities, but also contract work out to McKenzie Barge. He spoke quite highly of the competence of the skipper of the tug and the bargeman employed by them.

He said the voyage undertook by their tug and barge was a fairly routine one and that he first became aware of the problem when he received a telephone call from Captain McBirney advising him of the grounding of the barge.

The Pollution Control Centre in North Vancouver was notified and arrangements were made for the containment boom to be sent to the area from the Port Alberni Harbour Commission. A tug was also chartered from Tofino, the Surrey Guardian, upon which Mr. Stradiotti and other persons found their way to Hecate Bay.

There is no doubt on the evidence that North Arm cooperated completely with the authorities and expended a large sum of money (estimated by them to be in excess of $100,000.00) in the clean up and recovery of the barge and its contents.

The real issue in this case comes down to whether or not this incident is, as urged upon me by counsel for the accused, a serious marine accident which could not have been avoided, given the usual hazards associated with seagoing tugs and barges, or a case where one or more employees of the corporate accused were negligent in the performance of their duties and that that negligence was the cause of the barge grounding and subsequent loss of fuel oil into the waters of Hectate Bay. The corporate accused says in its defence that it exercised all due diligence to prevent the commission of the offence. That it had proper safety and repair regulations in effect for its barges, that it hires competent and capable employees, and that it has expended large sums of money in preventing and abating the damage caused by the oil spill. That it did all within its power to prevent and minimize the damage which occurred.

The Crown's view of the case is, if I may paraphrase it, that the accused was operating a barge which was not seaworthy. That there is ample first rate evidence of the condition of the barge from Fisheries Officers Smiley and Hebrun.

They cite the detailed evidence of Fisheries Officer Smiley as to the condition of the ullage caps on the stern tanks, the missing cap lying one foot from the pipe to which it belonged, the condition of the leaking metering pipes at the stern of the barge, and the hatch covers which were over the entrance to the floatation chambers at the stern of the barge.

Considering all of the evidence as a whole I feel I can reach certain conclusions of fact about which there is very little doubt. Namely:

1. That the barge grounded at a point between Stubbs and Wickaninnish Islands off the west coast of Vancouver Island at approximately 4:10 a.m. on February 16th, 1981.

2. Considering that the tug was said to draw 14 feet and the barge 10 feet, and that the tug did not go aground when the barge did, that the barge must have been weighted down very heavily in the stern to a draft below that of the tug.

3. The skeg on the starboard side of the barge bent and folded over, took metal with it and created a hole in the hull eight to ten feet in length and one foot in width as a result of the grounding.

4. The hole in the hull would cause the starboard floatation chamber to flood and make the stern even lower.

5. That one of the fuel tanks on the port side, the second from the stern was found to contain water only and to have no cap or cover covering the ullage pipe at Hecate Bay. The cap was found lying on the deck one foot away from the pipe.

   The condition of the threads on both the pipe and cap were found to be poor, so bad in fact that it was impossible to fit the cap on the pipe.

This tank contained diesel fuel at the outset of the voyage. The only inference to be drawn from this evidence is that the fuel in the tank was displaced by water entering the tank and the fuel escaped into the sea.

6. That at least one of the ullage pipes and caps on a fuel tank at the stern of the barge did not have a proper seal and was leaking oil when the barge was inspected on February 16th, 1981.

7. That the two hatch covers for the stern floatation chambers were not properly fastened down and were in that condition when the barge left port on February 14th, 1981 according to bargeman Berry.

8. As a result of loading additional machinery on the desk of the barge at Coleman Creek the stern of the barge was further brought down at the stern to about one foot of freeboard.

9. That when the additional machinery was loaded at Coleman Creek the existing track machinery and other cargo on the deck of the barge had to be shifted about to make room for the extra cargo.

10. No check was made by the bargeman as to the condition of the ullage plugs on the barge when the machinery was loaded at Coleman Creek.

11. That the ullage plugs on the barge are frequently damaged by the moving on and off of machinery and other cargo and these are replaced frequently for this reason.

12. That none of the fuel tanks were damaged below decks as a result of the grounding.

13. That there was a following sea before the grounding which would cause water to enter the barge by the stern. This would in turn, considering the state of the hatch covers, cause the stern to become even lower because the water would enter the floatation chamber.

14. When the barge was seen by Captain McBirney shortly after the grounding but before it was refloated, the stern was completely underwater.

15. Oil was first seen coming from the barge between 6:30 and 7:30 a.m. following the grounding at 4:10 a.m. The barge was beached in Hecate Bay around noon of this same day. Considering the evidence as to the extent of the oil spill it is a fair inference to be drawn that oil leaked from the barge into the sea for some five to six hours before the barge reached the bay.

16. Some cargo, principally lumber and oil drums, floated off the barge into the sea while it was grounded.

Considering all the evidence in this case, including that of Captain McBirney, the skipper of the tug hauling the barge, I have no difficulty in concluding that the barge grounded because its draft at the stern was low enough to enable it to come into contact with the sea bottom, or a reef thereon.

This grounding caused the skeg on the starboard side to fold over bringing metal with it and causing a large hole, or tear in the hull. This would cause the starboard floatation chamber to flood and lower the stern even more and render it in the condition seen and described by witnesses in Hectate Bay.

Was the grounding a mere marine disaster which could not have been avoided, or did it occur as a result of an unseaworthy barge?

I am of the view that when the evidence adduced in this case is considered as a whole, the inescapable conclusion is that the barge was not in adequate seaworthy condition.

Under normal circumstances the barge ought to have survived the grounding without fuel escaping from it into the sea. Indeed, the barge itself is designed to maintain its own integrity. The fuel tanks are all made of steel and individually constructed, vented and floatation compartments are built into it.

The bargeman who loaded the fuel onto the barge at the refinery said all ullage plugs and covers were secured when the loading was complete.

The bargeman Berry came on duty when the machinery had already been loaded on the barge at the North Arm dock and consequently said he couldn't check all the ullage caps and covers because they were covered by machinery.

The shifting of machinery and loading of more machinery on the barge, which took place at Coleman Creek before the grounding, no check was made of the ullage caps after this was done.

In my opinion this was the time when the ullage cap may have become displaced from the ullage pipe of the tank which was found later at Hecate Bay to be full of water. The movement of machinery on the deck of the barge could very easily have done this. For the bargeman not to ensure that this didn't happen is, in my view, negligence. We were told that steel plates were provided to prevent this occurring, and if this is the case, then plates ought to have been used. The bargeman was responsible to supervise the loading and shifting of the cargo even if it was done by others.

I do not believe, however, that the lack of the cap on the fuel tank was the cause of the grounding of the barge.

This was caused, in my view, by the defective hatch covers and hatch combing over the floatation compartments, which admitted water into this compartment, most likely by a following sea. The stern had been lowered to within only one foot of freeboard when the additional machinery was loaded at GreenCove.

The combination of these two factors would lower the stern to the point where it would come into contact with the floor of the sea.

The Master of the tug towing the barge elected to take a course between Stubbs and Wickaninnish Islands.

This area, according to the Master, was a fairly shallow area having only two to two-and-a-half fathoms at low water. At the time of grounding it was within one hour of low tide. This would give them about twenty feet of water.

The flooding of the stern of the barge would, in my view, cause the sea water to enter the fuel tank found to have no cap, or cover, by Fisheries Officer Smiley. This water would displace the diesel fuel carried in the tank and discharge it into the sea. This would account for the presence of oil seen floating in the water.

Taking all of the above factors into consideration, the defence of due diligence is rejected.

I think this very substantial oil spill could have been avoided had the accused corporation, and its employees, exercised due diligence in maintaining the integrity of the barge.

The words of Mr. Justice Seaton of our British Columbia Court of Appeal in *R. v. Gulf of Georgia Towing Co. Ltd.* (1979), 10 B.C.L.R. 134, at page 137 seem apt:

> "I think that the length that the employer must go to will depend on all the circumstances including the magnitude of the damage that will be done in the event of a mistake and the likelihood of there being a mistake. For fuel barges, if one does nothing but hire careful people, train them carefully and tell them not to leave valves open, inevitably a valve will be left open. I am sure they have not hired infallible people. There will inevitably then be a spill. It seems to me that the consequences are so serious that something will have to be devised by the company if it is to be protected here to prevent spills when employees are not as careful as they are told to be."

In this case the same reasoning must surely apply. This corporation certainly has not devised a system to ensure that all hatches are properly maintained and closed, that all ullage caps and pipes can be checked whenever cargo is loaded on and off the barge. It is not sufficient to excuse the lack of inspection on the fact that some caps are covered by machinery and cannot be checked.

There is no doubt on the evidence I heard that the oil spilled in this case was deleterious to fish. I am also able to conclude that it was a fairly substantial spill. One of the Crown witnesses estimated it to be fifteen hundred to twenty-five hundred gallons of fuel.

Another approach to this estimate might be to consider that the fuel tank, which was found to contain water and which had the missing ullage cap, held twenty-three thousand gallons before being displaced by the water.

The Crown has proven all elements of the charge contained in the Information beyond a reasonable doubt and consequently the accused corporation is found guilty.

ONTARIO COURT OF APPEAL

Re PERALTA et al. AND THE QUEEN IN RIGHT OF ONTARIO et al.
PERALTA et al. V. WARNER et al.

MacKINNON A.C.J.O., THORSON
and GOODMAN JJ.A.

Toronto, February 8, 1985

Administration law - Delegation - Governor in Council empowered to make regulations for management and control of fisheries - Delegating licensing function to provincial Minister without setting quotas for individual species - Minister issuing licences with quotas for individual species - Power to delegate necessarily implied in federal legislation - *Fisheries Act*, R.S.C. 1970, c. F-14, s. 34 - *Ontario Fishery Regulations*, C.R.C. 1978, c. 849 - *Game and Fish Act*, R.S.O. 1980, c. 182.

Constitutional law - Delegation - Governor in Council empowered to make regulations for management and control of fisheries - Delegating licensing function to provincial Minister without setting quotas for individual species - Minister issuing licences with quotas for individual species - Delegation of administrative rather than legislative power - *Fisheries Act*, R.S.C. 1970, c. F-14, s. 34 - *Ontario Fishery Regulations*, C.R.C. 1978, c. 849 - *Game and Fish Act*, R.S.O. 1980, c. 182.

Pursuant to s. 34 of the *Fisheries Act*, R.S.C. 1970, c. F-14, enacted pursuant to Parliament's authority under s. 91(12) of the *Constitution Act*, 1867, to legislate with regard to "Sea Coast and Inland Fisheries", the Governor in Council promulgated the *Ontario Fishery Regulations*, C.R.C. 1978, c. 849. Section 34 of the Act permits the Governor in Council to make regulations, inter alia, for the proper management and control of the sea-coast and inland fisheries, respecting the issuance of licences, and respecting the terms and conditions under which a licence is to be issued. The Ontario Fishery Regulations require a licence under the *Game and Fish Act*, R.S.O. 1980, c. 182. Pursuant to s. 29(4) of the *Ontario Fishery Regulations*, the provincial Minister of Natural Resources may, in any commercial fishing licence, designate the waters and the species, size and quantity for which the licence is valid. Section 29(5) permits the Minister to impose such terms and inconsistent with these regulations. Schedule VII of the regulations establishes, for commercial fishing, territorial quotas for different species of fish for specific waters for specific times, and Schedule VIII establishes minimum size limits. The Game and fish Act provides for the form of fishing licences and fees.

The Minister of Natural Resources of Ontario imposed fishing quotas for individual species in the licences of commercial fishermen based on past performance. In the past, the Minister had issued commercial fishing licences without specifying quotas for fish other than yellow pickerel.

On an application for judicial review of the Minister's determination to insert individual species quotas in commercial fishing licences, the trial judge granted the application on the ground that there was an unlawful delegation of power to the Minister on both administrative and constitutional law grounds. Following that decision, the Minister closed the commercial fishing season for two species in Lake Erie. For one species he set the quota at zero for the rest of the season. On appeal from the trial judgment and on a reference to the Court of Appeal of a subsequent application for judicial review to determine the validity of the two variation orders made by the Minister, **held,** the appeal should be allowed and the application on the referred matter dismissed.

The quotas were inserted by the Minister pursuant to the federal regulations, not the provincial. The Governor in Council has authority to subdelegate the power to set quotas in fishing licences, because s. 34(g) of the *Fisheries Act* allows the Governor in Council to make regulations "respecting" the terms and conditions under which a licence may be issued. It could not have been expected that the Governor in Council would exercise all the administrative power given to him and make individual licensing decisions, for there is a myriad of situations existing in the fisheries across Canada. The Governor in Council did not abdicate all his power to the Minister, for he set general conditions applicable to commercial fishing and to gill-nets and trawl-nets, established global quotas for commercial fishing of particular species from particular waters, and set minimum sizes. In setting individual quotas within these general policy guidelines, the Minister acted in a fashion consistent with the regulations.

The action of the Minister in setting individual quotas for commercial fishermen for particular waters was administrative, as it involved the application of a general policy in relation to particular situations in the province. Thus, it did not fall within the constitutional prohibition of interdelegation of legislative power.

The Minister had authority to close the commercial fishing season for two species after the trial judge's decision, for s. 6(1) of the *Ontario Fishery Regulations* permits the Minister to vary any quota fixed by the regulations, and s. 5(3) allows the Minister to vary any closed season fixed by the regulations.

Appeal from a judgment of Smith J. granting an application for judicial review of a decision of the Minister of Natural Resources of Ontario; and Reference to the Court of Appeal on an application for judicial review of a subsequent decision of the Minister pursuant to s. 34(1) of the *Judicature Act*, R.S.O. 1980, c. 223.

BLENUS WRIGHT, Q.C., and **PETER JACOBSEN,** for appellant, (Minister of Natural Resources).
JOHN CAVARZAN, Q.C., for appellant, (Attorney-General of Ontario).
T.L. JAMES, for appellant, (Attorney-General of Canada).
IAN G. SCOTT, Q.C., and **EDWARD P. BELOBABA,** for respondents.

MacKINNON A.C.J.O.

The matters before the Court were an appeal, and a reference pursuant to s. 34(1) of the *Judicature Act*, R.S.O. 1980, c. 223. The Minister of Natural Resources of Ontario appeals an order of the Honourable Mr. Justice Smith delivered on October 15th, 1984. In that order he granted the respondents' application for judicial review and declared the *Ontario Fishery Regulations*, C.R.C. 1978, c. 849, as amended, made under the *Fisheries Act*, R.S.C. 1970, c. F-14, and R.R.O. 1980, Reg. 414, as amended, made under the *Game and Fish Act*, R.S.O. 1980, c. 182, insofar as individual fishing quotas are concerned to be *ultra vires* and of no effect. He heard the application as a matter of urgency under s. 6(2) of the *Judicial Review Procedure Act*, R.S.O. 1980, c. 224.

On November 2, 1984, two variation orders were made by the Minister of Natural Resources under the *Ontario Fishery Regulations*. The applicants applied on November 5th pursuant to s. 6 of the *Judicial Review Procedure Act* to the Honourable Mr. Justice O'Brien for judicial review of those two orders. As the arguments and considerations were similar to those made in the application before Smith J., and as the appeal from his order was then fixed for hearing by this Court for November 15th, O'Brien J. referred the application to this Court under s. 34(1) of the *Judicature Act*, to be heard with the appeal. He made an interim order under s. 4 of the *Judicial Review Procedure Act* prohibiting the respondents, their servants and agents from seizing fish, equipment or boats of the applicants until the matter was dealt with by the Court, and he declared that the two orders made by the Minister were "unenforceable".

We directed that counsel for the appellants argue the appeal and the referred application sequentially and then called on the respondents, represented by the same counsel on both matters, to respond.

The Attorney General of Ontario and the Attorney General of Canada were served with notice pursuant to s. 35 of the *Judicature Act*, and they appeared by counsel at the hearing and before us to support the validity of the legislation.

THE APPEAL

The application for judicial review sought to review the decision of the appellant Minister imposing fishing quotas on the licences of commercial fishermen. The application was based on four grounds. The first two grounds, namely that the Minister failed to observe fundamental justice in imposing the quotas and that he had breached certain provisions of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, and the *Canadian Charter of Rights and Freedoms* were rejected by Smith J. and were not pressed before us.

The other two grounds are more serious. The applicants on the motion argued that the *Ontario Fishery Regulations*, passed by the Governor in Council under the federal *Fisheries Act* and Ontario Regulation 414 passed by the Lieutenant Governor in Council under the provincial *Game and Fish Act* constituted an unauthorized subdelegation to the provincial Minister as well as an unconstitutional interdelegation of federal legislative authority to the provincial Minister. The learned Divisional Court judge gave effect to both grounds in coming to his conclusion as to the validity of the actions of the Governor in Council in enacting the *Ontario Fishery Regulations* and of the Minister respecting the quotas.

THE FACTS

The issues involved in the appeal are basically legal ones and the facts are not in dispute, although the emphasis placed by the parties on those facts is somewhat different. The respondents are commercial fishermen holding commercial fishery licences for the year 1984, containing individual species quotas, issued by the Minister. In the past the Minister had issued commercial fishery licences to the respondents without restricting the quantities of fish caught by each licensee, with the one exception being a general restriction on yellow pickerel. Once a fisherman obtained a licence he was free to fish. There were no quotas.

In the view of the Minister and his advisors a quota system was necessary because of the depletion of fish stocks in Ontario, particularly in the Great Lakes. Across Ontario, according to the Minister, the destabilization and ultimate degradation of fish stocks had been caused by overfishing, pest species invasion and habitat deterioration. In certain areas of the Great Lakes major commercial stocks of certain fish have collapsed and the catch percentage of commercial fishing has dropped seriously. There are at the present in Ontario close to 1,000 commercial fishermen who land approximately 30 million dollars worth of fish annually.

The recreation industry is also seriously affected by the depletion of the fishery resource and according to the material filed the members of that industry are asking for measures to ensure a stable resource upon which they can plan their business decisions and recreational anglers their recreational pursuits. The Minister filed the affidavits of a number of fishermen which stated that the removal of the quota now imposed would affect irrevocable business decisions they had made on the basis of the quota and, ultimately, would jeopardize the fishery resource.

The respondents take the position that the above quoted facts are irrelevant. They do not dispute the need for preservation of the fishery resource nor do they reject quotas as a conservation technique. What they do dispute is the validity of "past performance" quotas and the validity of their imposition by the Minister in March, 1984.

The facts which the respondents consider significant are that they had hitherto managed their fisheries in reliance on an unlimited catch. Loans, based on an unlimited catch, were guaranteed by the federal Minister of Finance under the *Fisheries Improvements Loan Act*, R.S.C. 1970, c. F-22, to allow fishermen to invest in boats and equipment. Other loans were also guaranteed. The quotas imposed in March, they state, threaten their ability to meet those and other obligations. The respondent Peralta has another concern in that he and his family operate a fish processing plant to which he sells his fish, and which has operated in reliance on that catch.

Until 1984, commercial fishery licences were issued annually in January and were in force for the calendar year. However, in January 1984, the Ministry changed its practice and temporary permits were issued extending the 1983 licences. On March 26th the respondents received documents entitled "Commercial Fish Allocation". Although discussions had been held since 1980 between the Minister and the commercial fishermen regarding the establishment of a commercial fishing quota the March document was the first notification to them that the Minister had decided to impose a "past performance" system. The quotas were delivered to the licensees in May 1984 by means of a "Form 24" attached to their commercial fishing licences.

There were, apparently, appeals to an *ad hoc* review committee and correspondence with the Minister protesting the basing of licence quotas on "past performance" but the method of establishing the quotas was not changed. On September 7th, shortly before the autumn fishing season was to commence, the respondents brought their application for judicial review, which application was heard on September 26th and October 4th.

SUBMISSIONS ON THE APPEAL

Under s. 91(2) of the *Constitution Act, 1867*, Parliament is given exclusive legislative jurisdiction over "Sea Coast and Inland Fisheries". The effect of that subsection was determined by the Judicial Committee of the Privy Council in *Attorney-*

General of Canada v. Attorneys-General of Ontario, Quebec and Nova Scotia, (1898) A.C. 700. In dealing with s. 91(12) the Judicial Committee said the following (712-13):

> Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading, "Sea-Coast and Inland Fisheries" in s. 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time, it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred.

On the other hand under s. 92 of the *Constitution Act, 1867* the provincial legislatures have the following relevant exclusive legislative powers over:

> 9. Shop, Saloon, Tavern, Auctioneer and other Licences in order to the raising of a Revenue for Provincial, Local or Municipal Purposes.
>
> 13. Property and Civil Rights in the Province.
>
> 16. Generally all Matters of a merely local or private Nature in the Province.

As a result of the 1898 decision Parliament enacted general fisheries legislation, now the *Fisheries Act*, as amended, and the Governor in Council under s. 34 of that legislation promulgated fishery regulations in relation to each province. Those regulations delegate to provincial Ministers what the Minister here argues, so far as Ontario is concerned, is the administration of the regulations which he does along with the administration of related provincial legislation and regulations. The respondents submit that this is a delegation not authorized by the *Fisheries Act* and if the Act does allow for such delegation it is the delegation of a legislative power and is, accordingly, *ultra vires*, as determined by the Supreme Court in *A.G. Nova Scotia v. A.G. Canada*, (1951) S.C.R. 31, 1950 4 D.L.R. 369.

The relevant parts of the federal *Fisheries Act*, as amended by R.S.C. 1970 c. 17 (1st Supp.), provide:

> 7. The Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued, leases and licences for fisheries or fishing, wherever situated or carried on; but except as hereinafter provided, leases or licences for any term exceeding nine years shall be issued only under authority of the Governor General in Council.

34. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations.

(a) for the proper management and control of the seacoast and inland fisheries;

(b) respecting the conservation and protection of fish;

(c) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish;

(d) respecting the operation of fishing vessels;

(e) respecting the use of fishing gear and equipment;

(f) respecting the issue, suspension, and cancellation of licences and leases;

(g) respecting the terms and conditions under which a lease or licence may be issued;

(h) respecting the obstruction and pollution of any waters frequented by fish;

(i) respecting the conservation and protection of spawning grounds;

(j) respecting the export of fish or any part thereof from Canada;

(k) respecting the taking or carrying of fish or any part thereof from one province of Canada to any other province;

(l) prescribing the powers and duties of persons engaged or employed in the administration or enforcement of this Act and providing for the carrying out of those duties and powers; and

(m) authorizing a person engaged or employed in the administration or enforcement of this Act to vary any close time of fishing quota that has been fixed by the regulations.

The Governor in Council enacted, purportedly under s. 34, among other regulations, the *Ontario Fishery Regulations*. The following definitions and sections are relevant for the purposes of the appeal.

2.(1)...

"closed season" means, in respect of any fish, every period that is not an open season in respect of that fish;

"Department" means the Ministry of Natural Resources of Ontario;

"licence" means an instrument issued under *The Game and Fish Act*, R.S.O. 1970, Chapter 186, or the regulations made thereunder, conferring upon the holder the privilege to do the things set forth in the instrument, subject to the conditions, limitations and restrictions contained in it and the Act, the regulations made thereunder and these Regulations, but no licence shall be or operate as a lease;

"Minister" means the Minister of Natural Resources for Ontario and includes any person authorized by him to act on his behalf;

3.(1) Except as provided in these Regulations, no person shall fish for or take fish from any of the waters of the province.

12.(1) Subject to subsection (3), no person shall, except under a licence prescribed therefor, take or attempt to take fish by any means.

....

(3) A resident of Ontario may, without an angling licence, take fish by means of angling or pursuant to subsection 4(3).

29.(1) Licences other than angling licences include

....

(b) a commercial fishing licence;

(4) The Minister may, in any commercial fishing licence, designate

(a) the waters and the species, size and quantity of fish for which the licence is valid;

(b) the means of taking the fish for which the licence is valid;

(c) the use for which any fish may be taken;

(d) the number of nets and the size of the mesh thereof and any other fishing devices that may be used;

(e) the dimensions of nets or other fishing devices and the materials that may be used in the construction thereof;

(f) the period of time during which fishing operations may be conducted; and

(g) the person or persons who may conduct fishing operations under the licence.

(5) The Minister may, in any licence, impose such terms and conditions as are necessary for the conservation of fish and are not inconsistent with these Regulations and, without restricting the generality of the foregoing, may impose terms and conditions respecting the method of

(a) loading,

(b) landing,

(c) handling,

(d) transporting,

(e) possessing, and

(f) disposing, of commercial fish.
S.O.R. /80-265 s. 4(1)

(6) No holder of a licence shall violate any of the terms or conditions of the licence.

The current definition of "licence" reads:

"Licence" means a licence issued under the *Game and Fish Act Ontario* that is subject to these Regulations in addition to the conditions, limitations and restrictions referred to in that Act. (*Ontario Fishery Regulations Amendment*, S.O.R./84-112)

Schedule VII of the Regulations establishes for commercial fishing territorial quotas for different species of fish for specific waters for specific times. Schedule VIII establishes the minimum size limits for commercial fishing for different species of fish in the different waters.

The relevant provincial legislation is the *Game and Fish Act*. The stated purpose of the Act is "to provide for the management, perpetuation and rehabilitation of the wildlife resources in Ontario, and to establish and maintain a maximum wildlife population consistent with all other proper uses of lands and waters" (s.3). The administration of the Act is "under the control and direction of the Minister" (s.4). "Minister" is defined as the Minister of Natural Resources. All licence fees are to be paid to the Treasurer of Ontario (s.5).

The relevant portion of s. 92 of the Act reads:

The Lieutenant Governor in Council may make regulations:

1. establishing classes for licences referred to in this Act or the regulations or the Ontario Fishery Regulations, governing the issue, form, renewal, transfer, refusal and cancellation of licences or any class of them, prescribing their duration, territorial limitations, terms and conditions and the fees payable therefor, and limiting the number of licences of any class that may be issued;

Under s. 92, para. 1 the Lieutenant Governor in Council enacted Regulation 414 which was amended by O. Reg. 254/84 (made on April 18th and filed April 25th, 1984). The relevant portion of the amended regulation states:

4a(1) A licence issued under paragraph 29(1)(b) of the Ontario Fishery Regulations to take fish for commercial use by means of a gill net, pound net, trap net, trawl net, hoop net, seine net, dip net or trammel net, or by means of hooks, shall be in Form 24.

Form 24 sets out the form of licence with a space provided for inserting individual species quota. It is headed, "Form 24 Game and Fish Act", and below that it reads:

> Under the *Game and Fish Act*, and the Regulations, and subject to the limitations thereof and the limitations of the *Fisheries Act* and of the *Ontario Fishery Regulations*, this licence is granted to....

In the form and its appendices provision is made for the species, the waters and, most importantly, the quantities (or quotas) of the named fish species which could be taken. Appendix C of the licence is headed "Commercial Fishing Licence Quotas".

The practical question that has to be answered in this appeal is: is the Minister validly authorized to insert individual species quotas in commercial fishing licences?

As already stated, the Divisional Court judge held that the imposition of the quotas was invalid and of no force and effect because there had been an unauthorized subdelegation by the Governor in Council to the provincial Minister and, in any event, the subdelegation was, in effect, the delegation of a federal legislative power to the provincial Minister and *ultra vires*. I shall deal with these two findings in that order.

SUB-DELEGATION

In concluding that there had been an unauthorized subdelegation, the Divisional Court judge was of the view that where "regulatory powers as large as those powers are which s. 34 of the Act spells out, are subdelegated by the Governor in Council without any constraints, the subdelegation is unlawful in that it fails to carry out the clear intent of the Act, namely that the discretionary power be entrusted to and remain with the Governor in Council and no one else."

Was the Divisional Court judge right in holding that the "clear intent" of the Act was that the Governor in Council was to do everything with regard to the matters covered by s. 34 of the *Fisheries Act*?

Section 29(4) of the federal *Ontario Fishery Regulations* gives authority to the Minister to set quotas. The Ontario regulation only provides for the form of the licence and ss. 1-6 of Regulation 414 is headed "Forms of Licence and Fees". The *Ontario Fishery Regulations*, by its definition of "licence" incorporates that licence (that is the one issued by the Minister under the *Game and Fish Act*). As authorized by 29(4)(a) and 29(5) of the *Ontario Fishery Regulations* the Minister inserts into the licence the invididual quotas of the species to be caught within the particular time period. The total of these quotas, we were advised, were within the global figure set by the Governor in Council. Subsection 29(5) of the *Ontario Fishery Regulations* emphasizes that the terms and conditions imposed by the Minister in any licence must not be "inconsistent with these Regulations".

In my view the Divisional Court judge erred in holding initially that Reg. 414, as amended by O. Reg. 254/84, passed under the *Game and Fish Act*, authorized individual fishing quotas. Rightly or wrongly this authority came from the *Fisheries Act*, through the *Ontario Fishery Regulations*, to the provincial Minister. There is no question that under s-s. 92(9) and s-s. 92(14) of the *Constitution Act, 1867*, the province has the legislative power to license and to impose fees for those licences. The Ontario regulation goes no further than that. It was agreed that the licence, now in Form 24, is blank and that it is the Minister who sets and inserts the individual species quotas in the space provided, under the authority of s-s. 2(1), 29(4)(a) and (5) of the *Ontario Fishery Regulations* quoted above. The quota is inserted, in my view as I stated earlier, pursuant to the federal legislation and not pursuant to provincial legislation as asserted by the Divisional Court judge.

This conclusion does not, of course, answer the fundamental question, is there authority to subdelegate? Section 34(g) of the *Fisheries Act* allows for the Governor in Council to make regulations "respecting the terms and conditions under which a licence or lease is to be issued." (emphasis added). In dealing with this subsection the Divisional Court judge quoted the wording of the subsection as it stood prior to the amendment by R.S.C. 1970 (1st Supp.), c. 17. That wording was: "prescribing the terms and conditions under which a licence or lease is to be issued" (emphasis added). By the amendment it can be seen that the wording of the subsection was brought in line with ss. 34(b) to (k). The amendment must have had some purpose and significance and, in my opinion, Parliament was ensuring that the Governor in Council was empowered to delegate to others the administration of its regulations. Accordingly, I differ from the view expressed by the Divisional Court judge that "the clear intent" of Parliament was that the "discretionary power" was entrusted to the Governor in Council and no one else. It is difficult to accept that Parliament intended that the Governor in Council administer in detail the myriad of situations existing across Canada from the suburban areas to the remote north. If the respondents are right, the Governor in Council, in administering the regulations in the instant case, would be expected to allocate the thousands of individual quotas within the overall maximum quota it had set with relation to yellow pickerel as well as divide up the various water areas.

It is of interest to note that before the amendment changing the word "prescribing" to "respecting" in s-s. 34(g) when the other paragraphs at that time used the word "respecting", the French language version of both "respecting" and "prescribing" was the single word "concernant". The word "concernant" was also used to introduce the French language version of s. 34(a) which reads in English "for the proper management and control of the seacoast and inland fisheries". In using the same word "concernant" throughout it reinforces my view that it was always the intention of Parliament that the Governor in Council would have the power to subdelegate under par. 34(a) to (k), even though the word "prescribing" was originally used in par. 34(g) and had to be changed.

The use of the word "respecting" allows for a delegation of the administration of the regulations. Counsel for the appellant Minister argued that the wisdom and common sense of this interpretation is shown by the fact that it is the provincial ministers, familiar with the multiplicity of situations and problems in their own province, to whom these powers are delegated. However, I believe Mr. Scott to be right when he argued that we must find the right to subdelegate from the wording of the legislation itself and not from the manner in which the power is exercised. In the Act there is no indication of the person or body to whom the Governor in Council may delegate, and the fact that it has been to provincial ministers cannot by itself establish the right. However, the exercise of the right may be considered to show that interpreting the legislation as conferring the power of subdelegation does not lead to an absurdity.

When courts have considered whether delegation of ministerial powers was intended considerable weight has been given to "administrative necessity", that is, it could not have been expected that the Minister (in this case the Governor in Council) would exercise all the administrative powers given to him. Further, in such cases the suitability of the delegate has been a material factor in determining whether such delegation is intended and lawful. See Lanham, *Delegation and the Alter Ego Principle* (1984), 100 Law Q. Rev. 587.

"There is no rule or presumption for or against subdelegation": Driedger, *Subordinate Legislation* (1960), 38 Can. Bar. Rev. 1 at p. 22. The language of the statute must be interpreted in light of what the statute is seeking to achieve. As Professor Willis pointed out, the maxim *delegatus non potest delegare* does not state a rule of law; it is "at most a rule of construction" and in applying it to a statute "there, of course, must be a consideration of the language of the whole enactment and of its purposes and objects". Willis, *Delegatus Non Potest Delegare*, 21 Can. Bar. Rev. 257 (1943), at p. 257.

The first particular power given under the regulation-making power of the Governor in Council is "for the proper management and control of the sea coast and inland fisheries" (para. 34(a)). This states the general purpose of the entire section and a wide authority is conferred in the following paragraphs by the use, as noted earlier, of the word "respecting", "embracing any regulation for any purpose coming within the defined subject" matter: Driedger, *The Composition of Legislation*, 2nd ed. (1976), at p. 192. Driedger (at 193) points out that the distinction between purposes or subjects on the one hand and powers on the other is relevant to sub delegation:

> For example, if a Minister had powers to make regulations respecting tariffs and tolls he could authorize some other person to fix a tariff or toll; such a regulation would clearly be one respecting tariffs and tolls. But if the Minister's authority is to make regulations prescribing tariffs and tolls then the Minister must himself prescribe, and cannot delegate that authority to another. Expressions commonly used to introduce specific powers are prescribing, fixing, determining, prohibiting, requiring, establishing.

Looking at the nature and purpose of the statute, and the use of the word "respecting" ("concernant"), I am persuaded that subdelegation was intended by necessary implication, and the *prima facie* rule of construction *delegatus non potest delegare* gives way to the intent of the legislation.

> ... (T)he courts will readily mould the literal words of a statute to such a construction as will best achieve its object; because they will, recognizing the facts of modern government, readily imply in an authority such powers as it would normally be expected to possess; because the presumption of deliberate selection, strong when applied to the case of a principal who appoints an agent or a testator who selects a trustee, wears thin when applied to a statute which authorizes some governmental authority, sometimes with a fictitious name such as "Governor-in-Council" or "Minister of Justice", to exercise a discretion which everyone, even the legislature, knows will in fact be exercised by an unknown underling in the employ of the authority, the *prima facie* rule of *delegatus non potest delegare* will readily give way, like the principles on which it rests, to slight indications of a contrary intent. (Willis, op cit., at 260)

We were referred to a number of authorities by counsel for the parties in dealing with this question. The starting point for the submissions on this point by counsel for all parties were the statements of principle found in *Reference re Validity of Chemical Regulations*, (1943) S.C.R. 1, 1943 1 D.L.R. 248, 79 C.C. 1, sub nom. Reference re

Regulations (Chemicals) under *War Measures Act*. In that case it was held that regulations respecting chemicals made pursuant to the power conferred by the *Department of Munitions and Supply Act*, 1939 (Can.), C3 and by the *War Measures Act*, R.S.C. 1927, c. 206, were not *ultra vires* the Governor in Council. The Court also held that the Governor in Council had the power under the wording of s. 3 of the *War Measures Act*, to delegate his powers, whether legislative or administrative, to subordinate agencies. The wording of s. 3 was as follows:

> 3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:-
>
> (a) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
>
> (b) Arrest, detention, exclusion and deportation;
>
> (c) Control of the harbours, ports and territorial waters of Canada, and the movement of vessels;
>
> (d) Transportation by land, air, or water and the control of the transport of persons and things;
>
> (e) Trading, exportation, importation, production and manufacture;
>
> (f) Appropriation, control, forfeiture and disposition of property and of the use thereof.

Chief Justice Duff in dealing with the argument that the sub-delegation to subordinate agencies was *ultra vires* said (p. 11 S.C.R., p. 254 D.L.R.):

> I do not think that in their natural meaning the scope of these words is so narrow as to preclude the Governor General in Council from acting through subordinate agencies having a delegated authority to make orders and rules.
>
> The duty of the Governor General in Council to safeguard the supreme interest of the state, as contemplated by section 3, may, it seems plain, necessitate for its adequate performance the appointment of subordinate officers endowed with such delegated authority. I find it impossible to suppose that the authors of that enactment did not envisage the likelihood of the Executive finding itself obliged, in discharging its responsibility in relation to the matters enumerated in subparagraphs (a) to (f) to make use of such agencies.

and p. 12 S.C.R., p. 255 D.L.R.:

> I repeat, there is nothing in the words of section 3 that, when read according to their natural meaning, precludes the appointment of subordinate officials, or the

> delegation to them of such powers as those in question. *Ex facie* such measures are plainly within the comprehensive language employed, and I know of no rule or principle of construction requiring or justifying a qualification that would exclude them.

and p. 13 S.C.R., p. 256 D.L.R.:

> One observation of a general character remains. It is possible that in what has been said above it has not been sufficiently emphasized that every order in council, every regulation, every rule, every order, whether emanating immediately from His Excellency the Governor General in Council or from some subordinate agency, derives its legal force solely from the *War Measures Act*, or some other Act of Parliament. All such instruments 'derive their validity from the statute which creates the power, and not from the executive body by which they are made (The Zamora, (1916) 2 A.C. 77 at p. 90)'; and the *War Measures Act* does not, of course, attempt to transform the Executive Government into a legislature, in the sense in which the Parliament of Canada and the legislatures of the provinces are legislatures.

Mr. Justice Rinfret stated, as is the case in the instant appeal (p. 18) S.C.R., pp. 260-1 D.L.R.)):

> Parliament retains its power intact and can, whenever it pleases, take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies and how long it shall continue them in existence, are matters for Parliament and not for courts of law to decide. Parliament has not abdicated its general legislative powers. It has not effaced itself, as has been suggested. It has indicated no intention of abandoning control and has made no abandonment of control, in fact. The subordinate instrumentality, which it has created for exercising the powers, remains responsible directly to Parliament and depends upon the will of Parliament for the continuance of its official existence.

He went on later to state (pp. 18-19 S.C.R., p. 261 D.L.R.):

> Indeed, the power of delegation being absolutely essential, in the circumstances for which the *War Measures Act* has been designed, so as to have a workable Act, that power of delegation must be deemed to form part of the powers conferred by Parliament in the Act. The Governor in Council, within the ambit of the Act, is not a delegate. The Act constitutes a devolution of the legislative power of Parliament, and, within the prescribed limits, it can legislate as Parliament itself could. Therefore, it can delegate its powers, whether legislative or administrative.

Davis J. aslo wrote concurring reasons, pointing out that Parliament had not "effaced" itself, that the power to delegate was implicit in the Act, and that, if at all possible, a construction of the words used in the statute to carry out "the plain intention of those responsible for the Order in Council" is to be preferred (p. 24 S.C.R., p. 266 D.L.R. (quoting Viscount Maugham, Liversidge V. Anderson, (1942) A.C. 206)).

The respondents relied on the analysis by Hudson J. in the *Chemical Regulations Reference*, of the maxim *delegatus non potest delegare*. However, Hudson J. does point out that the maxim is at most a rule of construction and that there "must be a consideration of the language of the whole enactment and of its purposes and objects"

(p. 34 S.C.R., p. 276 D.L.R.). After that consideration in the case before him he held that the maxim was not applicable to the *War Measures Act*.

It was suggested that the conclusion of the Supreme Court in *The Chemical Regulations Reference* was based on the fact that the legislation there was "emergency" and wartime legislation and therefore not helpful in considering the effect of the legislation in the instant case. However, Chief Justice Laskin dealt with that suggestion in *Reference re Agricultural Products Marketing Act*, R.S.C. 1970, c A-7 et al. (1978) 2 S.C.R. 1198 at 1226 84 D.L.R. (3d) at p. 278, 19 N.R. 361, as follows:

> The matter of delegation in depth is covered by the judgment of this Court in *Reference re Regulations (Chemicals) under the War Measures Act* and I would not limit its rationale to emergency legislation.

The respondents, as did the Divisional Court judge, relied on *Attorney-General of Canada v. Brent* (1956), S.C.R. 318, 2 D.L.R. (2d) 503, 114 C.C.C. 296, and *Brant Dairy Co. Ltd. et al. v. Milk Commission of Ontario et al.* (1973), S.C.R. 131 30 D.L.R. (3d) 559 as well as on *Canadian Institute of Public Real Estate Companies et al. v. City of Toronto et al.* (1979), 103 D.L.R. (3d) 226, 8 O.M.B.R. 385, to support their position that there had been an illegal subdelegation in the instant case.

In *Attorney-General of Canada v. Brent*, the Supreme Court was considering the effect of an Order-in-Council passed by the Governor in Council under the regulation making power conferred on it by s. 61 of the *Immigration Act*, R.S.C. 1952, c. 325. The Governor in Council delegated all its powers and what it was directed to do to sub-delegates, Special Inquiry Officers. In holding this action *ultra vires*, Kerwin C.J. said on behalf of the Court (p. 321 S.C.R., p. 505 D.L.R.):

> ... Parliament had in contemplation the enactment of such Regulations relevant to the named subject-matters, or some of them, as in His Excellency-in-Council's own opinion were advisable and not a wide divergence of rules and opinions, everchanging according to the individual notions of Immigration Officers and Special Inquiry Officers. There is no power in the Governor General-in-Council to delegate his authority to such officers.

Once again in *Brant Dairy Co. Ltd. et al. v. Milk Commission of Ontario et al.*, the majority of the Supreme Court held that a regulation of similar effect was *ultra vires*. Spence J. speaking for the Court in applying the principle of the *Brent* and *Brant Dairy* cases in *Canadian Institute of Real Estate Companies et al. v. City of Toronto et al.*, summarized the *Brant Dairy* case as follows (p. 9 S.C.R., p. 231 D.L.R.):

> In the Brant Dairy case, the Regulations of the Commission permitting the action of the Board in enacting its Regulations there in question provided for, *inter alia*, the fixing and allotting to persons of quotas for the marketing of a regulated product on such basis as the Board deems proper. In each case, the subordinate legislating body purported to exercise the power by, to quote Laskin J., as he then was, in the *Brant Dairy* case, at p. 146:
>
> > What the Board has done has been to exercise the power in the very terms in which it was given. It has not established a quota system and allotted quotas, but has simply repeated the formula of the statute, specifying no standards and leaving everything in its discretion.

I am of the opinion that those words may be exactly adopted to the action of the Municipal Council in the enactment of By-law 419-74. There has been the mere simple repetition of the power and not the exercise of the power by the enactment of a by-law defining the desired regulations. Laskin, J., as he then was, continued on the same page:

> A statutory body which is empowered to do something by regulation does not act within its authority by simply repeating the power in a regulation in the words in which it was conferred. That evades exercise of the power and, indeed, turns a legislative power into an administrative one. It amounts to a redelegation by the Board to itself in a form different from that originally authorized; and that this is illegal is evident from the judgment of this Court in *Attorney General of Canada* v. *Brent* ((1956) S.C.R. 318).

As noted by the Divisional Court judge the opening two sentences of the headnote of *Canadian Institute of Public Real Estate Companies et al.* accurately summarizes for our purposes the facts and conclusion of that case (p. 226):

> Section 35a of the *Planning Act*, R.S.O. 1970, c. 349, as amended (1973, c. 168, s. 10), is enabling legislation which permits municipalities to pass by-laws "to prohibit or require the provision, maintenance and use" of certain facilities. However, a by-law passed by a municipality which simply repeats verbatim the provisions of the enabling legislation, specifying no standards and leaving everything to council's discretion, is an invalid exercise of the legislative power granted by the section.

In the instant case the Minister (the subdelegate) did not purport to do, and was not empowered to do, the same thing that the delegate, that is, the Governor-in-Council, was empowered to do. The regulation here, in my view, does not "simply (repeat) the power in a regulation in the words in which it was conferred".

The learned Divisional Court judge was fortified in his conclusion that the licensing powers and other activities delegated to the Minister were not merely administrative, but were "at the heart" of the scheme of the *Fisheries Act*, by the judgment of the British Columbia Court of Appeal in *R.* v. *Tenale et al.* (1983), 145 D.L.R. (3d) 521, 3 C.C.C. (3d) 254, 42 B.C.L.R. 91. The Court there held that the County Court judge from whom the appeal was taken was correct when he stated (p. 525):

> ... I do not find in the *Fisheries Act* itself any wording to support an argument that delegation was either intended or contemplated other than to those limited persons described in s. 34(m). Unlike the licensing cases referred to, the *Fisheries Act* contains no specific authority to delegate and certainly contains no suggestion that the whole subject of inland fisheries may be subdelegated to a Province with power and authority to legislate or regulate.
>
> Mr. Justice Seaton went on to say (p. 525):
>
> Both the broad introductory words to s. 34 and the specific provisions that follow contemplate the Governor in Council making the regulations.

It may be that on the facts of *Tenale* the Minister there was exercising the regulation-making power of the Governor in Council. However, in the instant case, with deference I am of the view that the *Ontario Fishery Regulations* were properly enacted. As stated earlier, the language used in s. 34 of the *Fisheries Act* allows for the Governor in Council to delegate the necessary powers to carry out the object of the *Regulations.*

Although commercial fishing licences are issued under the *Game and Fish Act*, the definition of "licence" (*supra*) makes it clear that such licences are subject to "these Regulations". Further, in the outlining of the kinds of licence in s. 29 of the *Ontario Fishery Regulations*, s-s. 29 (5) states that the Minister may impose "in any licence ... such terms and conditions ... (that) are not inconsistent with these Regulations ..." The Minister as subdelegate is not called on merely to repeat the regulations as was the case in *Brant Dairy.*

Mr. Scott forcefully argued that by virtue of s. 29(4) of the *Ontario Fishery Regulations*, the Governor in Council had effectively abdicated to the Minister all its powers which it and it alone could exercise. However, when one examines the *Regulations* it is clear that this is not so. For example, they detail the general conditions applicable to commercial fishing and to gill nets and trawl nets (ss. 30-43,46,57-59). They divide the waters of Ontario into special areas and they establish global quotas for commercial fishing of particular species from those waters. (ss. 34, 39(5),(6); 46(2); 59(1)). Commercial fish are defined in the definition section, and their minimum sizes are set out in Schedule VIII of the *Ontario Fishery Regulations.* The effect of the *Regulations* was to set general policy and in setting the individual quotas within those policy guidelines, the Minister was acting in a fashion consistent with the *Regulations.*

An authority in this province to which we were referred is the judgment of Cory J. in *Re Shoal Lake Band of Indians No. 39 et al. and the Queen in Right of Ontario* (1979), 25 O.R. (2d) 334, 101 D.L.R. (3d) 132. In dealing with the validity of the *Ontario Fishery Regulations* SOR/63-157, the learned judge held that by means of the *Regulations* the federal *Fisheries Act* adopted the machinery provided by the provincial *Game and Fish Act*, R.S.O. 1970, c. 186 with respect to the issuance of commercial fishing licences. He concluded, and this is relevant to the second issue before us, that the delegation (or adoption) was of administrative authority and was a proper exercise of Parliament's legislative authority.

The Divisional Court judge held that Cory J. had not dealt with the subject of sub-delegation, although counsel for the appellants argued that he had indeed dealt with that subject in the following passage (at pp. 344-345 D.R., pp. 142-3 D.L.R.):

> As I stated earlier, the provisions of the federal *Fisheries Act* and the *Ontario Fishery Regulations* passed pursuant to the federal *Fisheries Act* comprise the substantive law with respect to licences for commercial fishing in Ontario. There is adopted pursuant to those Regulations the machinery provided by the *Game and Fish Act*, R.S.O. 1970, c. 186, for the issuance of required licences. Although the Ontario *Game and Fish Act* provides that a licence may be issued by the issuer of a licence, his family and employees, that provision does not, in my opinion, apply to the licence to be issued under the federal *Fisheries Act.* Such a licence can only be issued by the issuer of licences under the *Game and Fish Act.* Indeed the issuer of licences is by Order in Council so designated. Although it is cumbersome, the machinery is adequate to comply with the provisions of the *Fisheries Act.* It is significant that this same procedure has been followed since 1898 following the decision in *A.-G. Can. v. A.-G. Ont., A.-G. Que. and A.-G. N.S.*, (1898) A.C. 700.

I have the same difficulty as the Divisional Court judge in accepting that passage as dealing directly with the issue of subdelegation. Be that as it may, the issue has been raised directly in the instant case and must be dealt with.

The respondent's position, put with his usual persuasive skill by Mr. Scott, was that exclusive jurisdiction to regulate inland [illegible]mercial fishing was in Parliament and the provinces are powerless to deal with catching fish for commercial purposes. He argued that the provinces can charge licence fees for the purpose of revenue but not for the purpose of regulation. He pointed out that the *Game and Fish Act* does not say anything about commercial fishing and regulates only what the province is empowered to regulate. The broad powers given by s. 34 of the federal Act, he submitted, cannot be passed off, and its general scheme "by-passed" by the Governor in Council and the Minister. He concluded that "virtually" all the aspects of the scheme and the policy were devised by the Minister. I have already indicated that in my view an examination of the Act and the Regulations and the actions of the Minister does not bear that out.

Counsel for the appellants submitted that the reasoning of the court in *Rex ex rel. Fletcher v. Joy Oil Co. Limited*, 1950 O.R. 766, 1951 1 D.L.R. 632, 98 C.C.C. 161, which was not referred to by the Divisional Court Judge, was more opposite to the problem which confronts us than any of the other authorities to which we were referred. In that case, s. 82a of the *Factory, Shop and Office Building Act*, R.S.O. 1937, c. 194, was in issue. Section 82(3) empowered municipal councils to pass a by-law determining the hours of closing of any class of shops within the municipality, and s. 82a was added in 1948. It read:

> 82a. In addition to any matter authorized by section 82, any by-law thereunder applicable to retail gasoline service stations, gasoline pumps and outlets in the retail gasoline service industry as defined in *The Industrial Standards Act* may, -
>
> (a) provide that the by-law shall apply only in the portion of portions of the municipality designated in the by-law;
>
> (b) require that during the whole or any part or parts of the year such retail gasoline service stations, gasoline pumps and outlets be closed and remain closed at and during any time or hours between six of the clock in the afternoon of any day and seven of the clock in the forenoon of the next following day and between six of the clock in the afternoon of Saturday and seven of the clock in the forenoon of the next following Monday; and
>
> (c) provide for the issuing of permits authorizing the retail gasoline service station, gasoline pump or outlet for which it is issued to be and remain open, notwithstanding the by-law, during the part or parts or the day or days specified in the permit.

The council of the city of Toronto passed a by-law entitled "A By-law to require the closing of gasoline service stations during certain hours", and this it proceeded to do generally with regard to all the gasoline service stations within the city. The by-law then established an "Advisory Committee" consisting of the Chief Constable or his representative, a representative of the City Council, three gasoline service station employees and two employees.

Section 6(1) of the by-law stated:

> 6. (1) Notwithstanding anything heretofore contained in this by-law the Chief Constable is hereby authorized to issue, upon the recommendation of the said Committee, permits to allow certain gasoline service stations to be and remain open during the part or parts of the day or days specified in the permit which permit may only be issued in accordance with certain regulations and restrictions as follows, namely:
>
> (a) Permits for Sunday may be issued only for the period from ten of the clock in the forenoon to five of the clock in the afternoon during the months of January, February, March, April, October, November and December and from nine of the clock in the forenoon to four of the clock in the afternoon during the months of May, June, July, August and September.
>
> (b) Permits for Sunday shall not be issued to more than twenty per centum of those gasoline service stations participating in a rotary system of remaining open and not more than one Sunday permit shall be issued in any calendar month in repsect to the same gasoline service station.

Mr. Justice Laidlaw, for the Court, reviewed the submissions made (at pp. 777-9 O.R., pp. 640-2 D.L.R.):

> It is urged that the power to make exceptions from the by-law rests primarily with the council of a municipality and that power cannot be vested by the council in any other subordinate authority or agency without power in the council of the municipality so to do, given to it either by the use of express language in a statute or by clear and necessary implication from an enactment of Legislature.
>
> In support of his argument, and as an illustration of the manner in which the Legislature expresses an intention to give the council of the municipality such power and authority, counsel refers to s. 422 of *The Municipal Act*, R.S.O. 1937, c. 266. In that section, it appears by the use of express language that by-laws may be passed: "1. For authorizing the city architect or other officer appointed for that purpose to permit in special cases, which in his judgment warrant it, such deviation from the by-laws regulating the errection of buildings as he may deem proper." No such language is used in the legislation now under consideration, and counsel contends that the language which was in fact used does not permit an inference from it that the Legislature intended to empower the council of a municipality to delegate to or confer upon some subordinate agency a power and authority which includes the exercise of a legislative function and which was vested by Provincial enactment in the municipal council and no other person.
>
> Counsel for the appellants argued that the learned judge erred in interpreting the statute as if it had provided that the council itself was required or empowered to issue the permits. It was said by counsel for the appellant Fletcher: "This duty was not delegated to the council by the statute." And: "The only duty that was delegated to the council by the statute was a duty to 'provide for the issue of permits'." Finally, counsel argued that the Chief Constable was not given by the by-law any legislative power, that his authority must be exercised within the limits provided by s. 6 of the by-law and was subject at any time to review or recall by the council itself.

> ...
>
> The answer to the question whether s. 6 of By-law 17275 is valid depends, obviously, upon the kind and extent of the power intended to be given to the council of a municipality by s. 82a(c) of *The Factory, Shop and Office Building Act*. If it was the intention of the Legislature to give to the council of a municipality, and to no other person or authority, the absolute discretion as to the persons and the times to be excepted from the by-law requiring gasoline service stations, pumps and outlets to remain closed, such intention could and no doubt would have been made plain in a simple manner by the use of express language. In the absence of such language, I cannot conclude that the Legislature intended that every application for a permit to keep a gasoline station, pump or outlet open, notwithstanding a by-law requiring such places to remain closed, should be the subject of consideration and action by the council of a municipality. The inconvenience which would be caused to the council of a municipality, to the applicants for permits, and to the public generally by such a procedure and system would be known and appreciated by the legislators, and in my opinion they would regard such procedure and system as impractical.
>
> It is my view that the intention of clause c of s. 82a of *The Factory, Shop and Office Building Act* was to empower the council of a municipality to establish a system for the issuing of permits which would not require an application to be the subject of consideration and action by it but rather by some subordinate agency or authority subject to the regulations and control of the council. That is what has been done by ss. 5 and 6 of the by-law in question. The council of the municipality has not thereby divested itself of power to amend the by-law from time to time by way of making exceptions to it or otherwise. It has made regulations and imposed restrictions in respect of the issue of permits, and those regulations and restrictions are binding on the Advisory Committee and the Chief Constable as provided in the by-law. The council of the municipality retains control in the matter of the issuing of permits and may alter the present regulations and restrictions in such manner and to such extent as in its discretion it deems necessary or advisable. In my opinion, ss. 5 and 6 of the by-law in question fall within the power of the council of a municipality to "provide for the issuing of permits" as contained in s. 82a(c) of *The Factory, Shop and Office Building Act* and are in accordance with the intention of that enactment. Therefore, I hold that the by-law is valid.

The authority conferred on the Chief Constable by the by-law was not the same authority vested in the Council by the statute. As counsel for the successful appellant in *Joy Oil* put it (p. 768 O.R.):

> All that has been delegated is the duty of issuing the permits under the system provided by the by-law. The Chief Constable cannot issue permits outside the scheme of the by-law, and his authority can always be revoked. The power to provide for the doing of something is very different from the power to do the thing.

It should also be noted that the word "provide" in to provide for the issuing of permits, is used, and this court held that that word allowed for the delegation of the power. As pointed out by counsel, that word appears "narrower" in the context of delegation than the word "respecting" used in s. 34 of the *Fisheries Act*. Mr. Scott seeks to distinguish *Joy Oil* from the facts of the instant case by pointing out that in *Joy Oil* a scheme was first set up by the delegating authority and then the administration delegated to the Chief Constable. In my view, that is what happened here on a much wider scale, covering, generally, a much more complex, diverse subject, and the same result obtained. The Minister was only empowered to act within the scheme established generally by the *Ontario Fishery Regulations*. I cannot accept that the Minister was delegated what the Governor in Council alone was empowered to do and that the regulations merely repeated what Parliament had given to the Governor in Council. As I have already said, I have concluded that the Governor in Council was empowered by the wording of s. 34 to subdelegated as it did.

The next question which falls to be decided is whether the delegation was of administrative or ministerial powers, or of legislative powers.

INTERDELEGATION

The Divisional Court judge, although indicating that it was not necessary to his decision, concluded that there had been, in effect, a transfer of legislative power from Parliament to the Province by the passing of the *Ontario Fishery Regulations*. He felt he should deal with the argument in view of the fact that Cory J. in the *Shoal Lake Band of Indians no. 39 et al. and the Queen in right of Ontario* (1979), 25 O.R. (2d) 334, 101 D.L.R. (3d) 132, had come to the opposite conclusion.

The Divisional Court judge dealt with the authorities which established that there cannot be an interdelegation between Parliament and the provinces of legislative powers. Counsel for the appellants, of course, accept this position and argue that what has occurred here has been a delegation of administrative and not legislative power. I have already indicated my opinion that this is the correct view of what occurred in the instant case.

In coming to his conclusion, the Divisional Court judge relied in part on the decision of the British Columbia Court of Appeal in *R. v. Tenale et al.* (1982), 145 D.L.R. (3d) 521, 3 C.C.C. (3d) 254, 42 B.C.L.R. 91. The majority there appeared to agree with the County Court judge that the *Fisheries Act* did not contemplate any delegation "other than to those limited persons described in s. 34(m)" (p. 25). The County Court judge sought to distinguish the *Ontario Fishery Regulations* as upheld in the *Shoal Lake* case, from the *British Columbia Fishery (general) Regulations*, but without a detailed analysis of both regulations side by side I am unable to say whether there is any difference in substance between the two. I have concluded that the British Columbia Court of Appeal has held, indirectly if not directly, that both subdelegation and interdelegation was effected by the *Regulations* there and that neither were permitted by the *Fisheries Act* or the general law. Counsel for the appellants argued that interdelegation was not dealt with by the British Columbia Court of Appeal. Mr. Belobaba for the respondents appeared to agree on that point, but submitted that the County Court judge in that case had held that there was an *ultra vires* attempts at interdelegation of legislative power. Be that as it may, the basic question which has to be determined under this heading is whether the powers delegated to the Minister under the *Ontario Fishery Regulations* are administrative or legislative.

As the Divisional Court judge pointed out, there is sometimes a fine line to be drawn between whether the powers being exercised are legislative or administrative. S.A. de Smith in his *Judicial Review of Administrative Action*, 4th ed. (1980), states (p. 71):

> A distinction often made between legislative and administrative acts is that between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.

This passage was quoted by Dickson J. speaking for the Supreme Court of Canada in *British Columbia Development Corporation et al. and Friedman et al.* (1984), 14 D.L.R. (4th) 129, (1985) 1 W.W.R. 193, 55 N.R. 298 *sub nom. British Columbia Development Corp. v. Ombudsman*, and he went on to say (p. 148 D.L.R. p. 312 N.R.):

> I find support for this view in the judgment of the Ontario Court of Appeal in *Re Ombudsman of Ontario and Health Disciplines Board of Ontario et al, supra.* The issue in that case concerned the extent of the Ontario Ombudsman's jurisdiction. The word under consideration was administrative. Morden J.A. said, at p. 608:
>
> > ... it is reasonable to interpret "administrative" as describing those functions of Government which are not performed by the Legislative Assembly and the Courts. Broadly speaking, it describes that part of Government which administers the law and governmental policy.
>
> In accord are *Booth v. Dillon (No. 3)*, (1977) V.R. 143 (S.C.), at p. 144; *Glenister v. Dillon*, (1976) V.R. 550 (S.C.), at p. 558.

As I said earlier, it cannot have been the intention of Parliament that the Governor in Council would have the obligation to issue individual licences with individual quotas to thousands of commercial fishermen, with regard to the different areas of the large lakes being fished, having set out in part at least the maximum total quotas for the individual species and set out generally the waters from which they might be taken.

Dickson J. also quoted (p. 147 D.L.R. p. 312 N.R.) from *1 Halsbury's Laws of England*, 4th ed., p. 7, para. 4 under the title *Administrative Law* as follows:

> The functions of government are classified as legislative; executive or administrative; judicial; and ministerial ... executive and administrative acts entail the formulation or application of general policy in relation to particular situations or cases, or the making or execution of individual discretionary decisions ...

The action of the Minister in fixing the individual quotas for commercial fishermen for particular waters "was the application of general policy in relation to particular situations or cases" in the Province. That action was, accordingly, administrative and did not fall within the ban on interdelegation of legislative power. (See also *Desrosiers v. Thinel*, (1962) S.C.R. 515 at pp. 517-518, 519).

In *Coughlin v. Ontario Highway Transport Board et al.*, (1968) S.C.R. 569 68 D.L.R. (2d) 384, the Supreme Court dealt with the argument that the *Motor Vehicle Transport Act*, 1953-54 (Can.), c. 59, particularly s. 3, constituted an unlawful delegation by Parliament to the provincial Legislature of the power to legislate in relation to a subject matter wholly within the legislative jurisdiction of Parliament, namely, inter-provincial motor vehicle carriage.

Catwright J., speaking for the majority, set out the problem (p. 574 S.C.R., p. 387 D.L.R.):

> From the above brief review of the relevant legislation it will be seen that as matters stand at present the question whether a person may operate the undertaking of an inter-provincial carrier of goods by motor vehicle within the limits of the Province of Ontario is to be decided by a Board constituted by the provincial legislature and which must be guided in the making of its decision by the terms of the statutes of that legislature and the regulations passed thereunder as they may exist from time to time.

In holding that the delegation was not a delegation of law-making power, Cartwright J. stated (p. 575 S.C.R. p. 388 D.L.R.):

> In the case before us the respondent Board derives no power from the Legislature of Ontario to regulate or deal with the inter-provincial carriage of goods. Its wide powers in that regard are conferred upon it by Parliament. Parliament has seen fit to enact that in the exercise of those powers the Board shall proceed in the same manner as that prescribed from time to time by the Legislature for its dealings with intra-provincial carriage. Parliament can at any time terminate the powers of the Board in regard to inter-provincial carriage or alter the manner in which those powers are to be exercised. Should occasion for immediate action arise the Governor General in Council may act under s. 5 of the *Motor Vehicle Transport Act.*
>
> In my opinion there is here no delegation of law-making power, but rather the adoption by Parliament, in the exercise of its exclusive power, of the legislation of another body as it may from time to time exist, a course which has been held constitutionally valid by this Court in *Attorney General for Ontario v. Scott* and by the Court of Appeal for Ontario in *Reginal v. Glibbery.*

To relate it to the instant case one needs only to substitute "Minister" for Board.

Mr. Justice Ritchie in his dissenting judgment took the same view of the legislation there under consideration that the Divisional Court judge took of the legislation now before us (p. 582 S.C.R., p. 394 D.L.R.):

> In the case of the *Motor Vehicle Transport Act*, direct authority has been given to the local board in each province "in its discretion to issue a licence to a person to operate an extra-provincial undertaking into or through the province", and the manner in which that discretion is to be exercised is not limited to such provincial regulations as the governor-in-Council may designate but is to be exactly the same as if the extra-provincial undertaking were a "local undertaking". In my view the effect of this legislation is that the control of the regulation of licensing of a "connecting undertaking", is turned over to the provincial authority, and in the Province of Ontario this means that the controlling legislation is the *Ontario Highway Transport Act*, R.S.O. 1960, c. 273, and the *Public Commercial Vehicles Act*, R.S.O. 1960, c. 319.

The reasoning of the majority is more applicable to the facts of the present case and it must also be noted that the Minister in determining the individual quotas is not the provincial legislator. Mr. Driedger in his article *The Interaction of Federal and Provincial Laws* (1976), 54 Can. B. Rev. 695 at p. 700, points out that "there are many federal statutes under which powers are conferred on provincial officials (for instance, *Food and Drugs Act, Game Export Act, Migratory Birds Convention Act, Fisheries Act, Explosives Act*)". (Emphasis added)

I have concluded that there has not been an *ultra vires* delegation of legislative power in the Governor in Council granting, through the *Ontario Fishery Regulations*, the Minister the powers to fix commercial fishing quotas in commercial fishing licenses.

The appeal is, accordingly, allowed and the order of the Court below set aside.

QUESTIONS REFERRED UNDER S. 34 JUDICATURE ACT, R.S.O. 1980, C. 223

In view of my answer to the first question, it is not necessary to answer the application for judicial review which was referred to this Court. However, we heard argument on the point and were asked to determine it. If the matter should go further, it might be helpful to state the Court's opinion on the referred question.

FACTS

Mr. Justice Smith delivered his reasons and made his order on October 15th. On November 2nd the Honourable Alan W. Pope, Minister of Natural Resources for Ontario, made two Orders. The first Order, Order 1984-2 entitled *Ontario Fishery Regulations Variation Quota Order* purported to close down the autumn commercial fishing season for yellow perch in Lake Erie from the date of the order. The quota became zero kilograms from November 2, 1984 to December 15, 1984, the time originally fixed in the *Ontario Fishery Regulations* for the end of that season.

The second Order, Order 1984-6, entitled "*Ontario Closed Season Variation Order*" purported to close the autumn commercial fishing season for yellow pickerel (walleye) in the waters of Lake Erie in the counties of Kent and Essex from November 2nd to December 15th.

The applicants are two commercial fishermen who fish the designated waters of Lake Erie under the authority of licences issued to them by the respondent Minister. They brought their application for judicial review of these Orders on November 7th, and, as earlier stated, since the appeal from Smith J.'s order was to be heard on November 15th, O'Brien J., under s. 34 of the *Judicature Act*, referred the matter before him to this Court to be heard at the same time as the appeal. In order to maintain the status quo he declared the two orders unenforceable and, in addition, granted interim relief by way of an interim injunction prohibiting the Minister, his servants and agents from seizing any fish, equipment or boats of the applicants pending the determination by this Court of the appeal and the reference.

CONCLUSION

Order 1984-2 was issued pursuant to authority given to the Minister by s. 6(1) of the *Ontario Fishery Regulations* which provides:

> 6(1) Any fishing quota fixed by these *Regulations* may be varied by order of the Minister.

By that order the Minister in reducing the quota to zero for the rest of the original fishing season, in effect, fixed the quota at what had been already taken from the designated waters.

Order 1984-6 was issued pursuant to authority given to the Minister by s. 5(3) of the *Ontario Fishery Regulations* which provides:

> 5(3) Any closed season fixed by these regulations may be varied by order of the Minister.

The authority for these provisions of the *Ontario Fishery Regulations* is s. 34(m) of the *Fisheries Act* which I quoted earlier. It provides that the Governor in Council may make regulations:

> (m) authorizing a person engaged or employed in the administration or enforcement of this *Act* to vary any close time or fishing quota that has been fixed by the regulations.

One does not have to rely in this question on an implied power to delegate; the power is given explicitly. Having held, on the appeal, that there was an implied power to delegate the administrative powers to carry out the scheme of the *Fisheries Act* it is a fortiori that s-ss. 5(3) and 6(1) were valid exercises of the power.

ORDER 1984-2

The applicants submit that the order of the Minister was more than a variation as permitted by the *Fisheries Act* and the *Ontario Fishery Regulations*; it was a complete elimination of the quotas. In reality that is not so. Clearly there were yellow perch caught by commercial fishermen from June 1st, 1984, the beginning of the open season, to November 2nd, 1984. The effect of the order was to vary the total amount of 9,071,850 kilograms originally set for the open period, to the number of kilograms caught from June 1st to November 1st. The order was, in my opinion, a valid one.

ORDER 1984-6

This order, it will be remembered, close the commercial fishing season for yellow pickerel from November 2nd to December 15th. Prior to this order the open season for commercial fishing for yellow pickerel in the designated area was from the "first Tuesday in September to December 15th."

"Close time" is defined in s. 2 of the *Fisheries Act* as meaning "a specified period during which fish to which it applies may not be fished".

"Closed season" under s. 2 (1) of the *Ontario Fishery Regulations* means, "... every period that is not an open season....".

"Open season" under s. 2(1) of the *Regulations* means "... a specified period during which that fish may be taken".

As noted, under s-s. 5(3) of the *Regulations*, the Minister is empowered to vary any closed season.

The applicants argue that no actual "closed season" was varied or fixed by the *Regulations.* The only season that was fixed in the *Regulations* with regard to yellow pickerel was an "open season" and, they submit, s. 2(1) draws a clear distinction between "open seasons" and "closed seasons". They argue that the order did not vary the December 15th closing date but rather "instantaneously eliminate(d) any such season altogether". The argument became rather refined thereafter and I must admit, after hearing the submissions on this point, to having considerable sympathy with Lord Bramwell in *Bank of England* v. *Vagliano Brothers,* (1891) A.C. 107 to 138, where he said: "This beats me". I cannot see that reducing the "open season", by enlarging the "closed season", thereby varying the closed season, is not a variation of the closed season, even though it at the same time varies an open season. It is irrelevant that the *Regulations* define "closed season", as already stated, merely as " ... every period that is not an open season ...". I do not think that it is appropriate that the Court should approach the interpretation of such legislation as a matter of pure semantics and so strictly as to, effectively, make nonsense out of it.

I would dismiss the application. The effect of this is to set aside the declaratory order of O'Brien J. and to dissolve the interim injunction granted by him as well as setting aside the order as to costs. There will be no order as to costs either here or below.

In the result and in summary, the appeal is allowed, the order of Smith J. set aside and on the referred matter the application is dismissed, the declaratory order of O'Brien J. set aside and the interim injunction dissolved.

(Editors Note: There was an appeal to the Supreme Court of Canada which was heard in May 1988. No judgement was available at the time of publication).

BRITISH COLUMBIA PROVINCIAL COURT

R.v. PETRO-CANADA INC.

GODFREY, Prov. Ct. J. June 7, 1984

***Clean Air Act*, S.C. 1970-71-72, c.47 - Section 36 - Exceeding the allowable lead concentration in the production for sale of lead-free-gasoline - Due diligence defence failed - Fine of $2,500. levied.**

The accused was charged with exceeding the allowable lead concentration in the production for sale of lead-free-gasoline, contrary to section 36 of the *Clean Air Act*. The defence led evidence that only two persons, the lab supervisor and the process planner had the specifications as to allowable limits of lead concentration. A single test of approximately three to four hours was conducted by a technician who provided results to the lab supervisor. The supervisor transferred the results to a Gas Blending Report, which listed allowable limits and to a Daily Lab Report, which did not. The supervisor was to circle in red on the latter report any results in excess of limits. That report went to the process planner for a double check.

The defendant argued that it exercised due diligence in hiring competent people, in using the testing system described and in distributing the allowable specifications to the lab supervisor and process planner.

Held, the Court found the accused guilty.

The Court held that the defence of due diligence had not been made out. The Court considered the judgement of Mr. Justice Seaton (as he then was) in *R. v. Gulf of Georgia Towing Co. Ltd.* to be the most helpful as to the due diligence defence. Human beings will inevitably make errors. Given the magnitude of this damage, namely, release of 8,000 barrels which represented 3/4 million dollars worth of fuel, this company had an obligation to ensure results were within specifications before the gas was released for sale. The Court remarked that it was incomprehensible that technicians actually doing the tests were not given the specifications. The Court was satisfied the offence wasn't the result of an attempt to get a better profit. The finding of guilt was based on lack of diligence in testing systems.

B.A. HARPER, for the Crown.
G.K. MacINTOSH, for the Accused.

GODFREY, Prov. Ct. J.

Petro-Canada Incorporated is charged with contravening the Clean Air Act by producing for sale lead free gasoline that exceeded the allowable lead concentration. It is conceded by the defendant that the gas produced did, in fact, exceed the allowable lead concentration. The sole issue in this case is whether or not the defendant company has established under Section 36 of the Clean Air Act that,

> "...the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission."

There is no real dispute on the facts. The defendant company has a refinery at Taylor, British Columbia, which produces, amongst other things, six batches of lead free gasoline a year. The batch that was ultimately tested in the refinery lab at Taylor on May 5th, 1983, produced a test result that was in excess of the allowable limit with respect to lead concentration. And this is clearly set out on the Gasoline Blending Report dated May 5th, 1983, and the Daily Lab Report dated May 6th, 1983. This result was not caught by anyone in authority at the refinery, and the gas was distributed. It was only in July when test results from the Alberta Research Council, used by the corporation as a periodic check on their testing procedures, were received that the company was alerted to the problem and the tank was quarantined. Approximately eighteen hundred of the eight thousand barrels were ultimately unable to be retrieved by the company and presumably were sold to the public.

In establishing its defence, the company presented a detailed picture of the management structure of the Taylor refinery and of the theoretical testing procedure. None of the persons actually involved in these tests gave evidence on behalf of the company. On the defence evidence two persons, the lab supervisor and the process planner, bore responsibility on a sixty/forty basis for assessing the end result of the --and testing the end result of the refinery's production. These were the only two persons who had the specifications as to the allowable limits of, amongst other things, lead concentration.

A single test of approximately three or four hours duration of the batch was conducted by a technician who provided the results to the lab supervisor. The lab supervisor transferred the results to the Gas Blending Report which listed allowable limits. And as well, someone, either one of the technicians or the lab supervisor, placed these results, along with the results of several other tests or other batches, on the Daily Lab Report which I simply pause to note did not list any allowable limits. The obligation of the lab supervisor was to review the Daily Lab Report and circle in red on the Lab Report any results which were in excess of allowable limits. This was not done in this particular case; that is, there was no red circle on the Daily Lab Report. The Lab Report was then sent to the process planner. In theory, his responsibility was to compare the actual results with the allowable specifications and provide, in effect, a double check on the lab supervisor.

Having seen the reports, (sic) and listened to the evidence and, in particular, reviewed the various materials before me, I'm satisfied that the process planner's responsibility was a theoretical one, and the crucial individual was the lab supervisor. At the time in question these appear to have been competent, well qualified individuals.

The defendant company argues that it has exercised all due diligence in hiring competent individuals, in using the testing system described, and in distributing the allowable specifications to the lab supervisor and the process planner. The Crown argues that given the importance of the results and the fact of a single test, the company has a very high obligation to ensure that these results are properly interpreted. The Crown suggests, amongst other things, it would have been a simple matter to provide the specifications to the technicians who actually did the tests to provide a simple first alert system. And that given that the Lab Report is not necessarily filled out by the lab supervisor that at the very least he should have been required to sign it to signify that he had, in fact, reviewed the results.

There are very few cases of assistance in this area. I have read and considered the material provided by both counsel. I accept the proposition that the accused must establish due diligence on a balance of probabilities. Of all the cases cited, I find Mr. Justice Seaton's judgement in *R. v. Gulf of Georgia Towing Co. Ltd.*, 1979 3 W.W.R., at page 84 to be the most helpful. At page 87 Mr. Justice Seaton states,

> "To test the suggested error of law, I would suggest this: that due diligence under the circumstances here might include specific written instructions, maybe locking devices for other valves, possible alarm systems. But in the end I am of the view that the trial judge decided -- and rightly decided -- that this company did not make adequate provisions in its systems or otherwise to prevent a spill caused by a valve being open that should not have been open. I think that the length that the employer must go to will depend on all the circumstances including the magnitude of the damage that will be done in the event of a mistake and the likelihood of there being a mistake. For fuel barges, if one does nothing but hire careful people, train them carefully and tell them not to leave valves open, inevitably a valve will be left open. I am sure they have not hired infallible people. There will inevitably then be a spill. It seems to me that the consequences are so serious that something will have to be devised by the company if it is to be protected here to prevent spills when employees are not as careful as they are told to be."

He further goes on at page 88 of the judgment to quote an except from *R. v. Sault Ste. Marie*,

> "The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system."

On the facts before me, the accused has not established on a balance of probabilities that it exercised all due diligence to prevent the commission of this offence. I'm satisfied as a fact that in reality the lab supervisor bore the responsibility of noticing an error. And given the magnitude of the damage, that is release of eight thousand barrels, some three quarters of a million dollars worth of fuel, and the fact that as Mr. Justice Seaton points out human beings will inevitably make errors, the company had an obligation to ensure an effective method of ensuring the results were within specifications before the gas was released for sale. The company would known best how to do this, but I simply comment in passing that I find it incomprehensible that the technicians actually doing the tests were not given the specifications involved.

In any event, the company has not satisfied me that it exercised all due diligence to prevent the commission of this offence, and I find the company guilty as charged.

SENTENCING

I'm satisfied that the defendant is and has been a good corporate citizen and that the offence involved wasn't based on a profit motive, that is, they weren't tinkering with the amount of lead involved in order to somehow work a better profit to them. I found them guilty based on the lack of diligence in terms of the testing systems. However, I think the point has to be made that the -- the Regulations are there and the testing systems are there to protect the community in general.

Keeping in mind all of the factors cited by both the Crown and the Defence, I'm imposing a penalty of twenty-five hundred dollars in this matter.

YUKON TERRITORY TERRITORIAL COURT

R. v. PLACER DEVELOPMENT LTD.

STUART, Terr. Ct. J.

Whitehorse, December 12, 1983
January 2, 1985

***Fisheries Act* R.S.C. 1970 c.F.-14 as amended - Section 33(2), depositing a deleterious substance into water frequented by fish - Diesel fuel into Don River.**

Sentencing - Section 33(7) order to prepare manual covering the common environmental problems encountered in northern inland mineral explorations.

The accused was charged with depositing a deleterious substance into waters frequented by fish, contrary to the *Fisheries Act* R.S.C. 1970, c.H-4, section 33(2).

A plastic pipe connecting a 10,000 gallon filler tank to a 500 gallon day tank, used in the transport of diesel fuel, was left over the winter completely exposed. In the spring of 1981 the valve on the filler tank was found in a wide open position; the Court found it had been frozen open. The Court also found that the 10,000 gallon filler tank was found nearly empty.

The Defence raised the following 6 arguments:

1. a spill did not in fact occur;
2. if it did occur, it was not deleterious;
3. the water in question was not frequented by fish;
4. the accused was not responsible for the activities that caused the spill as it was the responsibility of an independent contractor;
5. the accused exercised all due diligence; and
6. the Crown had failed to prove the accused's corporate identity.

Held, the accused was found guilty.

With respect to the first and second arguments raised by the defence it was found as a fact that diesel fuel did leak from the accused's fuel system and that expert evidence and previous decisions established that diesel fuel is a deleterious substance. There is no need to prove that the receiving waters were rendered deleterious.

With respect to the third argument raised by the defence it was held that the Crown can discharge its burden of proving beyond a reasonable doubt that the water is frequented by fish by proving that fish frequented the immediate receiving water, or water affected by the receiving water, sometime within the year. It is then open to the accused as a result of section 33.4(3)(b) of the *Fisheries Act*, as amended, to prove on a balance of probabilities that at all material times the water was not in fact frequented by fish. In this case, the Crown discharged its burden but the accused failed to do so.

On the fourth point raised by the defence the Court found that the accused was responsible for the activities of the independent contractor that directly led to the spill because the contract between the parties empowered the accused to supervise and influence the offending conduct. They had the opportunity and expertise to exercise their responsibility and failed to do so.

On the fifth point raised by the defence the Court found that the accused did not exercise all due diligence. Several negligent acts attributed to the accused's subcontractors were found to have caused the spill, including the design of the feed system, a valve being left open, a plastic pipe connected to the open valve, the location of the pipe in relation to a steel bar which ultimately damaged it and the lack of any formal inspection system at the time the site was abandoned for the winter. The negligence of the subcontractors was held not to exonerate the accused. Under the circumstances, the accused should have required, by contract, that a formal inspection system be adopted and further, under the particular circumstances of this project, the accused could reasonably be expected to carry out an independent inspection of all foreseeable potential threats to the environment.

Similarly, the failure of government officials to carry out their statutory powers of inspection does not exonerate the accused. Both of these factors may properly be considered only in mitigation of sentence.

With respect to the final argument raised by the defence the Crown was allowed to reopen its case to prove the corporate identity of the accused. Under the circumstances, the court found that there would be no undue delay, the matter was essentially one of form since the identity of the accused was not in issue in the trial and the accused's lawyer and witnesses all identified themselves as representatives or employees of the accused, and that there would be no prejudice to the accused in allowing the reopening to rectify an innocent mistake which would otherwise defeat the ends of justice.

The Court, pursuant to section 33(7), ordered the accused to prepare a manual covering the common environmental problems encountered in northern inland mineral explorations in the Yukon and Northwest Territories. The completion of the manual, stated the Court, should assist all operators involved in exploration work in the North and would be particularly helpful to small operators lacking the in house expertise found in larger corporations. It should assist the federal and territorial governments in developing prudent environmental practices by all mining operations. As the federal department of Environment had been consulted by the Crown and had acquiesced in the production of this manual, it was hoped the Department would co-operate with the company in completing the manual.

I. McKinnon, for the Crown.
B. Ward, for the Accused.

STUART, Terr. Ct. J.

Placer Developments Ltd. is charged with unlawfully permitting the deposit of diesel fuel in the Don River between November 23, 1980 and May 7, 1981, contrary to s. 33(2) of the *Fisheries Act*, R.S.C. 1970 F-14:

> "s. 33(2) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter such water."

In this strict liability offence, the unique facts, and to some degree the unique pattern of the Crown's case, caused battle lines to be drawn over every conceivable question including such basic questions as whether the Crown had properly proved the identity of the accused. In defense the accused submitted that:

a) no spill occurred,

in the alternative if a spill did occur:

b) the spill was not deleterious, and

c) no fish frequented the water where the spill occurred, and

d) the accused was not responsible for the activities at the mining camp;

and in the further alternative, if the accused was responsible:

e) the accused exercised due diligence in attempting to prevent the spill,

and finally:

f) the accused submitted the Crown had failed to prove the corporate existence of the accused.

A) Was There a Spill of Diesel Fuel?

At Howard's Pass Campsite, the fuel tank farm consisting of three 10,000 gallon tanks, three 5,000 gallon tanks, one 8,000 gallon tank and one 3,800 gallon tank, had a total capacity of 56,800 gallons. The fuel tank farm was located at the top of a hill approximately 100 yards from the Don River, within a specially constructed berme lined with an impermeable synthetic liner. A 1 1/2 inch diameter plastic pipe connected to the bottom of a 10,000 gallon filler tank in the fuel tank farm transported the fuel over the berme, down the hill along the ground to a control valve on the top of a 500 gallon day tank. The plastic pipe was tied to a piece of drill steel for support. The drill steel was planted in the ground several feet in front of the day tank. In November of 1980, this plastic pipe was tied to but not resting against the drill steel. The day tank, located approximately 10 yards from the Don River, supplied the daily fuel requirements for the equipment at the mine site.

By opening the valve at the bottom of the 10,000 gallon filler tank, and opening the valve at the top of the 500 gallon day tank, fuel could be moved by gravity from the tank farm to the mine site.

The Crown submits sometime after November 23, 1980, and before May 7, 1981, 10,000 gallons of diesel fuel leaked out of the system and eventually flowed into the Don River. The evidence established the conditions necessary to permit a leakage, namely:

1. The valve on the bottom of the 10,000 gallon filler tank on the tank farm was open.

2. The plastic pipe connecting the filler tank to the day tank was fractured approximately 2 1/2 feet from the valve on the day tank.

Despite the opportunity for leakage, did any fuel leak out?

In mid-October, 1980, the system contained approximately 2,000 gallons. The continuing operations at the mine site until closure on November 3, 1980, left an insignificant amount of fuel in the system. From November 24, 1980, to November 30, 1980, White Pass delivered 48,354 gallons to the tank farm. Due to the extremely cold conditions at the time, two simple notions governed White Pass deliveries. The drivers tried to drop an entire load (6,000 gallons) into one tank, thereby minimizing the number of hose transfers from one tank to another in each delivery. Further, they filled the most accessible tanks first, leaving the tanks at the back of the tank farm to the last. Giving the accused the most favourable view of the amorphous evidence, the 10,000 gallon filler tank can be considered as the most inaccessible tank and thereby the last to receive any fuel.

Based on all the evidence and especially the evidence of White Pass' driver Mr. Balmforth, fuel was deposited in the 10,000 gallon filler tank. Given the fuel capacity of the tank farm, the number of fuel deliveries and taking into consideration the fuel delivery procedures of White Pass, between 1,500 and 2,000 gallons was placed in the 10,000 gallon filler tank.

Upon the opening of camp in early May, 1981, the 10,000 gallon filler tank was nearly empty. The almost insignificant amount of diesel fuel found in the river in the Spring of 1981 is explained by a number of factors.

a) Not 10,000 but between 1,500 and 2,000 gallons leaked out of the system;

b) The leak could have occurred as early as November 30, 1980, thereby allowing ample time for the diesel to form its own river on top of the ice on the Don River and disappear downstream;

c) Partial Spring thawing by early May may have flushed out most of the remaining visible traces of diesel;

d) Some of the diesel may have settled into the ground near the day tank;

e) Government officials did not comprehensively sample the river to trace the spill. The sample taken was barely sufficient proof of a spill and did little to prove either the magnitude of the deposit alleged, or to prove any significant damage to the environment.

The Crown established beyond a reasonable doubt that diesel did leak from the fuel system at the accused's mine site into the Don River. Other possible sources of diesel spillage do not rebut the evidence of a leakage from Placer Developments Ltd. XY Mine Site into the Don River.

Despite the circumstances and amount of the spill, coupled with the absence of any proof of damage, the principles of *de minimis* do not apply. (*R. vs. McBurney* (1974), 26 C.R. 114.) The extent of environmental damage within the context of a prosecution under the statutory scheme of s.33(2) and 33(8) of the *Fisheries Act* is only relevant in sentencing.

B) Was the Spill Deleterious?

White Pass placed into the accused's fuel system Low Pour-40 - also known as Winter Weight Diesel Fuel. The deleterious impact of diesel fuel on fish or fish habitat has been frequently established (*R. vs. Canadian Forest Products* (1978), Fisheries Prosecution Reports 168 @ 170.)

If it is necessary to establish in each case that diesel fuel is a deleterious substance, the expert evidence in this case has satisfactorily proven the deleterious nature of diesel fuel.

Once a substance is found to be deleterious, there is no need to prove the receiving waters were rendered deleterious. (*R. vs. MacMillan Bloedel (Alberni) Limited (1979), 47 C.C.C. (2d) 118 @ 120, R. vs. Jack Cewe Ltd. (1981), 10 C.E.L.R. 120; R. vs. North Vancouver (1982), 11 C.E.L.R. 158 @ 165.*)

The amount of deleterious substance deposited does not affect the question of liability. (*R. vs. MacMillan Bloedel*, (supra).)

C) Were the Waters Frequented by Fish?

In *R. vs. MacMillan Bloedel*, (supra) at p. 119, the Court held:

> "If it is apparent that fish used the water in question regularly -even if only annually for a short period -then such water would, in my opinion, qualify as "water frequented by fish".
>
> In dealing with the word "water", the learned trial judge placed many limitations upon it and apparently concluded that Parliament had intended by the use of the words "water frequented by fish" to mean areas frequented by fish. I can find no authority to support such a conclusion. I believe the court must take judicial notice that fish move around and, further, that waters move around. (Emphasis mine.)

The decision in *R. vs. MacMillan Bloedel*, (supra), was rendered on June 12, 1978, and dealt with an offence which had occurred on February 15, 1977. On September 1, 1977, s.33.4(3)(b) was proclaimed in force. The Court in *R. vs. MacMillan Bloedel*, (supra), did not deal with this section. Section 33.4(3)(b) states:

> "For the purpose of any proceedings for an offence under subsection (1) or section 33,
>
> (a) ...
>
> (b) No water is "water frequented by fish" as defined in subsection 33(11) where proof is made that at all times material to the proceedings the water is not, has not been and is not likely to be frequented in fact by fish."

(*Fisheries Amendment Act* 1976-77, S.C., Vol. 2, c.35, s. 10)

Proof that the water is frequented by fish in light of s.33(2), s.33(3)(b), and *R. vs. MacMillan Bloedel*, (supra), is as follows;

i) The Crown must initially prove beyond a reasonable doubt that the water is frequented by fish. *R. vs. MacMillan Bloedel*, (supra), renders this a relatively easy task. Proof that fish at sometime within the year frequented the immediate receiving water, or water affected by the receiving water, will suffice.

ii) However, if the accused can prove on a balance of probabilities that "at all times material to the proceeding", the water was not in fact frequented by fish, the accused must be acquitted.

The evidence established fish inhabit the downstream parts of the Don River in summer. Within the broad and liberal definition of *R. vs. MacMillan Bloedel* (supra), the Crown proved the water is frequented by fish.

Pursuant to s.33.4(3)(b) there is insufficient evidence to establish on a balance of probabilities that no fish in fact frequented the water during the material time. The material times are the alleged date or dates of the offence (November 23, 1980 to May 7, 1981). The water consists of the immediate receiving water and any water that the deleterious deposit affects. If leakage from the fractured plastic pipe occurred when the Don River was frozen to the bottom, then certainly at that time no fish frequented the immediately adjacent water of the Don River. However, by May 7, 1981, the river immediately downstream of the site was partially open and flowing. The accused failed to establish that the spill occurred when the river was frozen to the bottom, or that the diesel fuel did not find its way downstream, or that the water downstream on or before May 7th, was not in fact frequented by fish.

D) Was the Accused Responsible for Activitites at the Mining Camp?

In *R. vs. Pacific Logging Company Ltd.* (1974), 5 W.W.R. 523, the accused, hired a wholely-owned subsidiary, MacKenzie Logging Ltd., to log timber on land owned by the accused. MacKenzie Logging Ltd. had in turn subcontracted the work to Lens Logging Ltd. The logging by Lens Logging Ltd. deposited logs and other debris into a creek. In this case, acquittal was based on finding the accused was neither the employer nor the principal of the Company depositing debris into the creek. A significantly different approach to the question of responsibility is found in *R. vs. The City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353. At page 376, the Court held:

> "Nor does liability rest solely on the terms of any agreement by which a defendant arranges for eventual disposal. The test is a factual one, based on an assessment of the defendant's position with respect to the activity which it undertakes and which causes pollution. If it can and should control the activity at the point where pollution occurs, then it is responsible for the pollution. Whether it "discharges", "causes", or "permits" the pollution will be a question of degree, depending on whether it is actively involved at the point where pollution occurs, or

> whether it merely passively fails to prevent the pollution. In some cases the contract may expressly provide the defendant with the power and autority to control the activity. In such a case the factual assessment will be straight forward. Prima facie, liability will be incurred where the defendant could have prevented the impairment by intervening pursuant to its right to do so under the contract, but failed to do so. Where there is no express provision in the contract, other factors will come into greater prominence. In every instance the question will depend on an assessment of all the circumstances of the case.
>
> "Whether an "independent contract" rather than an employee" is hired will not be decisive.
>
> . . .
>
> A municipality cannot sluff off responsibility by contracting out work. It is in a position to control those whom it hires to carry out garbage disposal operations, and to supervise the activity, either through the provisions of the contract or by municipal bylaws. It fails to do so at its peril." (Emphasis mine)

Several important concepts distinguish the approach in *R. vs. Sault Ste. Marie* (supra), to responsibility in strict liability prosecution, from the approach in *R. vs. Pacific Logging* (supra):

1. The legal classification of a contractual relationship between the parties while relevant is less important than determining if the accused had an ability to influence or control the offending conduct of the other contractual party.

2. If the accused had an ability to influence or control the offending conduct, the accused must do so and cannot escape this responsibility by contracting out to an independent contractor. "...a Corporation cannot escape conviction merely by saying its mind and will was delegated to another, an independent contractor." (*Aurora Quarrying Ltd. vs. Catherwood* 1982, 6 W.W.R. 517 @ 522.)

3. The ability to influence the conduct of an independent contractor or any other part is measured by the powers the accused may employ to affect the conduct in question. These powers may derive from legislation, financial control, executive control, expertise, ownership, or contractual or legal rights, and from any other factor creating an influential bargaining power, position of authority, or ability to control offending activities.

Applying these concepts, derived from *R. vs. Sault Ste. Marie*, (supra), I find the accused did have the ability, and therefore the responsibility, to influence the offending conduct for the following reasons:

i) Influential Position:

The accused initiated the project by contracting Harrison Pacific to do an explanatory audit. There is no evidence to suggest as owner of the mineral deposit, the accused, in the contract, could not have imposed upon Harrison Pacific a clear responsibility to exercise care in using and storing fuel.

ii) Contractual Powers:

The accused submitted, primarily on the evidence of its senior mining geologist on the site, Mr. Morganti, that irrespective of the contractual terms, both Mr. Morganti and Mr. Phillipon (Harrison Pacific's man in charge at the campsite) conducted themselves in a manner that accorded Harrison Pacific exclusive control over the fuel system. Unfortunately, Mr. Phillipon was not called to testify by either Crown or the Defense.

While the practice of contracting parties can govern the interpretation of contractual terms, the evidence of the practice of the accused and Harrison Pacific on the site, fails to refute the clear contractual responsibilities imposed upon the accused for the fuel system.

Mr. Goddard, an employee of the accused, returned to the camp to accept a fuel delivery by White Pass, and, on behalf of the accused, signed for the fuel delivered. The accused held the water license for the campsite operations. On all of the evidence, I have no reasonable doubt that the following contractual provisions empowered the accused to influence the offending conduct.

> "Section 13 -The term 'Engineer' where used herein shall mean J.M. Morganti or such other persons the owner may nominate in writing in his place or in addition to him."

This provision in the agreement is important in light of the following provisions from the attached Schedule 'D' to the contract - "General Conditions to the Agreement":

"Article 5 - The contractor shall operate modern equipment in good condition and maintain such to the satisfaction of the engineer."

"Article 7 - The Engineer shall have general supervision and direction of the work. He shall have the authority to stop or delay the start of the work whenever such stoppage or delay may be necessary to ensure the proper execution of the contract. He shall also have the authority to reject all work and materials which do not conform to the contract and decide questions which arise in the execution of the work."

"Article 9 - All work performed by the contractor, and all materials furnished by the contractor hereunder shall be subject to inspection by the Engineer and his representative to determine compliance or non-compliance with the specifications."

Section 16 of the Agreement states:

> "The owner agrees to supply or maintain the following at no cost to the contractor:
>
> i) fuel oil, gasoline or lubricants required for the work."

iii) Expertise:

The accused was required to possess, and did possess, sufficient expertise to be aware of the potential risk to the environment posed by a fuel system in northern mining camps. At the very least, their expertise was sufficient for the accused to flag the risks in the contract.

Further, the accused had the opportunity and knowledge in the field, through their employees Mr. Morganti with 32 months field experience, and Mr. Goddard with 25 years experience, to influence the offending conduct on the site.

iv) Summary:

Within the criteria established by *R. vs. Sault Ste. Marie* (supra), the accused was in a position to control or influence the offending activity and therefore had a responsibility to do so.

E) Did the Accused Exercise due Diligence?

Several negligent factors caused the spill.

i) Plastic Pipe

The plastic pipe connecting the 10,000 filler tank in the tank farm to the 500 gallon day tank at the mine site was not disconnected when the operations closed down in early November nor when the fuel was delivered in late November. Designed to allow a gravity feed from the 10,000 gallon filler tank down the hill over rough ground to the day tank next to the river, the connected plastic pipe was left completely exposed to possible harm by nature and man over the winter. The absence of any winter use for the fuel system and the numerous feasible alternatives for re-connection in the Spring, heightens the unnecessary risk assumed in leaving an unprotected plastic pipe connected in a gravity feed fuel system.

ii) Drill Steel Bar

Siting the plastic pipe next to a many-sided drill steel bar invited the very fracture that occurred. Vibrations in the plastic pipe caused by fuel movement through the pipe, or the pressure of several feet of snow, may have caused the fracture. Whatever the cause, the plastic pipe was fractured by rubbing or pressing against the drill steel bar.

The siting of the plastic pipe reflects expediency and convenience, not prudence.

iii) Valve at Bottom of Filler Tank:

The plastic pipe connected to the 10,000 gallon filler tank through an ordinary manually operated valve which was located at the bottom of the filler tank. Leaving a 10,000 gallon fuel tank unattended over the winter with an accessible and unlocked valve at the bottom of the tank posed an unnecessarily dangerous risk. In the past, bungs replaced valves when the fuel system was mothballed for the winter.

iv) Valve Left Open

The 1981 Spring opening of the mine site found both the 10,000 gallon filler tank and the day tank almost empty. The valve on the 10,000 gallon filler tank was found in the wide open position.

Mr. Goddard of Placer Developments returned in late November to supervise the fuel delivery by White Pass. He informed Mr. Balmforth, a White Pass driver, that some of the tanks had valves.

Mr. Balmforth was not clear about many important facts. At best, his evidence reveals he dug down through several feet of snow to the valve and determined the valve was tight. He did not determine if the valve stem was up or down. Nor did he remember turning the valve. At the time weather conditions were extremely hostile. In testing the valve on the filler tank, Mr. Balmforth did not determine if the valve was frozen open or closed. The valve, in light of all the evidence, was frozen open.

v) No Inspection System:

Mine operations in 1980 continued until early November when the predictably harsh conditions of winter engulfed the site. Weather conditions denied the planned use of planes and forced reliance on helicopters to move camp personnel out for the winter. The evidence did not characterize the closing operations as stricken by panic, but the adverse weather conditions did focus concern on moving people out and closing down as quickly as possible. In closing the camp for winter, there were no check lists or formalized inspections of potential risks; everything was left to chance. Given the location of the 10,000 gallon filler tank and the weather conditions, a careless failure to close the valve is eminently believable.

Two Harrison Pacific employees returned to the site in late November to check equipment at the mine site. No evidence supports any intention or action on their part to check the fuel system.

vi) Summary:

Once White Pass placed fuel in the 10,000 gallon filler tank, the gravity feed system, the open valve, the connected plastic pipe, and the steel drill bar were poised for the dance of disaster. No formal inspection system or check list for closing the site was employed. Everything depended on someone assuming responsibility to ensure the safe storage of fuel for the winter -- no one did.

STANDARD OF CARE REQUIRED

> "s.33(8) In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission."
>
> (Amendment to *Fisheries Act* (1969-70), S.C. c. 17, s.3(1).)

To constitute a defense pursuant to this section, all due diligence must be exercised. While not tantamount to absolute liability, more than the care expected of an ordinary citizen is demanded. In the very least, the care must reflect the diligence of a reasonable professional possessing the expertise suitable to the activity in issue. (*R. vs. Giftwares Wholesale* (1977), 36 C.C.C. (2d) 330.)

No one can hide behind commonly accepted standards of care if, in the circumstances, due diligence warrants a higher level of care. Reasonable care implies a scale or caring. A variable standard of care ensures the requisite flexibility to raise or lower the requirements of care in accord with the special circumstances of each case. The care warranted in each case is principally governed by the gravity of potential harm, the available alternatives, the likelihood of harm, the skill required, and the extent the accused could control the causal elements of the offence. (*R. vs. Gonder* (1982), 62 C.C.C. (2d) 326 @ 332.)

Gravity of potential harm - The greater the potential for substantial injury, the greater the degree of care required. The severe environmental consequences of a diesel fuel spill in remote northern terrain requires special care and attention by all persons involved. (*R. vs. Panarctic Oils (1983)*, 12 C.E.L.R. 37; *Canada Tungsten vs. R.* (1976) Fisheries Pollution Reports 75A @ 79.)

Alternatives - Reasonableness of care is often best measured by comparing what was done against what could have been done. The reasonable alternatives the accused knew or ought to have known were available, provide a primary measure of due diligence. To successfully plead the defense of reasonable care the accused must establish on a balance of probabilities that no feasible alternatives could be employed to avoid or minimize harm. (*R. vs. Gonder* (supra) @ 333.)

Pumping fuel from the top of the filler tank down to the day tank offered a safer, inexpensive alternative, to the gravity feed system employed. Replacing valves with bungs for winter storage was a safer alternative employed in the past. Disconnecting the plastic pipe when not used in winter, and cushioning the plastic pipe against the drill steel, offered readily known and easily available safer alternatives.

A reasonable alternative to minimize risk in operations such as in this case, is a formalized system of inspection of all potential risks (*Canadian Tungsten vs. R.* (supra), @ p. 79; *R. vs. Texaco Ltd. (1979)*, 2 Fisheries Pollution Reports 214 @ @ 226; *R. vs. Gulf of Georgia* (1980) 2 Fisheries Pollution Reports 252, B.C.C.A.) The circumstances of each case determine the extent of supervision or inspection expected. The cost of inspection, opportunity for inspection, the relatively expertise of parties involved, foreseeability of harm, and the potential magnitude of harm, all define the kind of inspections reasonable care warrants. (*R. vs. Standard Oil*), January 20, 1975, unreported, B.C. County Court; *R. vs. Canadian Forest Products* (supra) @ 174; *R. vs. Center Datsun Ltd.* (1976), 29 C.C.C. (2d) 78.)

Particularly where the work delegated or contracted out may endanger the public, it is incumbent upon persons in a position of control or influence to ensure care is taken to avoid that danger by supervision or inspection, by improvement of business methods or by exorting those whom they may be expected to influence or control. (*R. vs. City of Sault Ste. Marie* (supra) @ 371.)

Likelihood of Harm - The greater the likelihood of harm, the higher the duty of care. What particular facts heighten or diminish the likelihood of an accident will vary in each case. Assessment of the likelihood of harm is based on what an appropriately qualified expert might reasonably predict.

The size of the operation, remoteness, special climatic conditions, the inherent risks in the activity or in the materials used, all weigh heavily in determining the likelihood of risk. All of these factors in this case pose a relatively high likelihood of substantial harm obligating the accused to take more care than to simply rely on Harrison Pacific to exercise all due diligence. The magnitude and likelihood of harm necessitated a reasonable plan of monitoring, and inspecting the work at the camp. (*R. vs. Gulf of Georgia Towing* (supra) @ 254.)

Degree of Skill Expected - Anyone choosing to become involved in activities posing a danger to the public, or to the environment, assumes an obligation to take whatever measures may be necessary to prevent harm. The costs of preventive measures are significantly less important in assessing the duty of care imposed upon persons who choose to undertake dangerous activities. (*Sweet vs. Parsley* (1970), A.C. 132 @ 163.)

Unless equipped with the appropriate professional skills, no-one ought to undertake any activity involving a danger to the public. The degree of professional diligence required depends on commonly accepted practices of that specific activity and upon the specific circumstances. (*Tesco vs. Nattress* (1972), AC 153 @ 197.)

Mining in the north requires not only an expert knowledge of mining, but equally important, an expert appreciation of the special problems caused by remote operations in northern environments.

Matters beyond control of accused - No accused can be held accountable for unforeseeable accidents and for activities beyond the reach of what they might reasonably be expected to influence or control. (*Reynolds vs. G.H. Austin & Sons Ltd.* (1951), 2 K.B. 135 @ 149.) None of the events in the causal link leading up to the spill were caused by reasonably unforeseeable accidents or involved matters beyond the influence or control of the accused.

Winter conditions, although severe in the area, were not unusual in the Winter and Spring of 1980/81. Foreseeable adverse weather conditions require reasonable precautions. Whatever contributing influence can be attributed to nature, this influence could have been avoided by reasonable foresight and preventive steps. (*R. vs. Pioneer Timber Company Ltd.* (1979), 9 C.E.L.R. 66 @ 69; *R. vs. Falconbridge Nickel Mines Ltd.* (1982), 11 C.E.L.R. 136 @ 140.)

NEGLIGENCE OF THE PARTIES INVOLVED

(a) Placer Developments

In many respects the accused acted competently. They hired Harrison Pacific, a company with the requisite expertise to carry out the mining adit. They relayed all pertinent information from government agencies to Harrison Pacific. A properly bermed and synthetically lined base for the fuel tank farm was constructed. They apprised White Pass drivers that some tanks on the fuel farm had valves. In past winters, the accused had tried using a watchman, and had reasonably concluded that posting a watchman was neither necessary nor safe. Their negligence arises less from what they did than from what they failed to do.

The cases of *Aurora Quarrying Ltd. vs. Catherwood (supra), and R. vs. Sault Ste. Marie* (supra), establish that persons or corporations in positions to influence behaviour through their legislative powers, bargaining strength, expertise or other powers have a responsibility to ensure reasonable care characterizes all activities they can influence. This responsibility cannot be passed to another corporation through the simplistic manoeuver of contracting out the project. If this simple evasion of responsibility was tolerated, corporations could be incorporated solely for the onsite work and thereby be practically immune to the sanctions of criminal prosecutions.

The circumstances of each case, and particularly the realistic abilities of the accused to influence the offending conduct, will measure the extent of the responsibility required. The failure of the accused to properly acquit the responsibilities imposed by the circumstances of this case are highlighted by three prominent factors:

(i) Locus of Operation

A higher standard of care attaches to anyone operating in particularly sensitive, valued or vulnerable environments. (*R. vs. Panarctic Oils* (supra); *Canada Tungsten vs. R.* (supra). All remote environments are particularly vulnerable due to the difficulties in detecting and responding to spills in time to prevent serious harm. Delicate physical or ecological characteristics and valued habitat for flora or fauna, identify sensitive or valued environments.

The Crown must prove that the location of the operation, or the environment affected by the offence, have unique characteristics which impose a higher standard of care, and that the accused knew, or ought to have known, of these unique characteristics. In the absence of such proof, and where judicial notice is not appropriate, the accused must only establish he exercised the due diligence required under normal conditions.

Indisputably remote, the Don River in Howard's Pass was not proven to possess any other unique characteristics.

(ii) Obvious Potential Hazard

Most lay people listing the probable environmental hazards in a northern mining operation would likely note the use and storage of diesel fuel. The accused did not take any special note of the fuel system in the contract or through their involvement on the project site.

The obvious problems posed by the use and storage of large quantities of diesel fuel in remote mining operations, imposes an obligation upon the accused to anticipate, foresee and take reasonable precautions to minimize any risk to the environment. They cannot be blind to such obvious problems.

(iii) Ability to Influence Offending Conduct

As owner of the mine site and originator of the project at Howard's Pass, Placer Developments had sufficient bargaining power to address in the contract with Harrison Pacific Ltd. the obvious potential hazard posed by the fuel system. This was not done. No evidence suggests Placer Developments tried or lacked the ability to stipulate in the contract the care required to properly maintain, construct and close down the fuel system.

Placer Developments had a further opportunity to influence the offending conduct at the mine site. Despite the alleged confusion over the responsibilities flowing out of the contract, the contract was sufficiently clear to enable the accused to take corrective action in the face of any unsatisfactory situation. Placer Developments, through their onsite employees Mr. Morganti and Mr. Goddard, had the expertise, opportunity and sufficient knowledge to alert Harrison Pacific of potential problems caused by the fuel system. Neither employee did anything of any consequence to investigate conditions or to ensure Harrison Pacific took care in using the fuel system.

(iv) Summary

A balance must be sought between the obligations imposed to exercise reasonable care and the freedom required to pursue financially viable contractual arrangements in developing northern resources. The tolerable range of contractual flexibility must not encourage manoeuvering to avoid reasonable obligations to influence law abiding conduct of persons within a sphere of influence or control. Equally, legitimate business objectives cannot be precluded by the undue imposition of responsibility for the activities of business associates or partners. Discovering the appropriate balance between responsibility for the conduct of others and freedom to contract, requires sensitivity to both perspectives.

The evidence fails to prove that the imposition upon the accused of a responsibility to exercise reasonable care or to take reasonable steps to influence law abiding behaviour by Harrison Pacific and, to a lesser degree, to influence the behaviour of White Pass, would create undue restraints on their freedom to conduct business.

This case provides a good example of the circumstances when a duty to influence law abiding conduct ought to be imposed in contractual relationships. In contracting out, Placer Developments' responsibility to ensure reasonable care should have been exercised in the contract by establishing contractual obligations upon Harrison Pacific to adopt a formal system of inspection of foreseeable risks. Further, especially in the absence of formal inspections imposed upon or carried out by Harrison Pacific, the circumstances of this mining project reasonably warranted an independent inspection by the accused of all foreseeable potential threats to the environment. (*R. vs. Aberdeen* (1981), 11 C.E.L.R. 25 @ 27.)

On the evidence heard, both Harrison Pacific and White Pass were negligent. No one appeared on their behalf to challenge any of the evidence. The question of contributory negligence was not significantly addressed by counsel. Whatever influence principles of contributing negligence may have in strict liability offences, in light of the facts and submissions by counsel, I am satisfied the negligence of the other parties does not, in this case, excuse the liability of the accused. The negligence of the other corporations may best be addressed as mitigating factors in sentencing.

(b) Harrison Pacific

The evidence highlights the negligence of Harrison Pacific. The fuel system exclusively serviced their operating needs. They designed, constructed, and operated the system used to transport fuel from the tank farm to the day tank at the mine site. Harrison Pacific had the best expertise, the best opportunity and the best means of all the parties involved to anticipate the problem and to take preventive measures.

The haunting similarity of the negligence found in *R. vs. Canada Forest Products Ltd.* (supra), starkly underlines the negligence of both Harrison Pacific and Placer Developments as both companies should have had on site an "environmentally conscious" professional capable of anticipating the dangers at Howard's Pass:

> "...the company had maintained an oil pipe line feeding their heating boilers, the pipe line was hanging in the air on the bracket and was subject to wear from vibration and that ultimately there was a rupture in the oil line at this point. I find that such a rupture or damage to the pipe could have been anticipated by the company and the ultimate rupture of the pipe would indicate that there was not due diligence exercised in the maintenance of the pipe to prevent the leakage. Ten feet from the oil pipe line, a sewerage outlet lead directly to the sewerage outfall discharging the sewer wastes out to the water frequented by fish. I find that the company did not use all due diligence to prevent the commission of the offence in allowing the open outlet to be located in an area adjacent to oil pipe lines. Surely, an environmentally conscious engineer would have anticipated the dangers of an oil spill to the salt water, had this type of construction been examined in consideration of the prevention of environmental damage."

(c) White Pass Corporation Ltd.

White Pass drivers were apprised of the valves in the tank farm and were responsible to ensure the valves were closed. The perfunctory testing by Mr. Balmforth, the White Pass driver who delivered fuel, failed to meet the reasonable standard of care expected and required in the circumstances. In *R. vs. the Gulf of Georgia Towing Ltd.* (1978), 2 Fisheries Pollution Reports 159, the Court held at 161:

> "...reasonable precautions must be held to include a close and continual scrutiny of the valves in question throughout the entire pumping procedure or failing such scutiny, some other method of ensuring that the valves in question would be closed and remain closed throughout."
>
> (Approved on appeal to the B.C. Court of Appeal *R. vs. Georgia Towing Company Ltd.* (1980), Fisheries Pollution Reports 252.)

Mr. Balmforth, with his many years of experience, knew or ought to have known that:

i) the valve at the bottom of the 10,000 gallon filler tank if not closed posed a very obvious and dangerous risk once the tank was filled; and

ii) the fuel system would stand unused and likely unattended until spring; and

iii) the valve could have been frozen open.

The obvious and reasonable testing measure of checking the valve stem position was not employed. When fuel is delivered for storage over the winter

> to isolated mining camps, reasonably cautious practice required White Pass to take meticulous care to ensure all valves were closed, or to replace valves with bungs, or require customers to do so as a pre-requisite to fuel delivery.
>
> Placer Developments employee, Mr. Goddard, testified he "never gave it a second thought...assumed people putting in fuel would check the valves". Reasonable care on the part of Placer Developments would preclude total reliance upon White Pass to ensure the valves were closed. Further, had Placer Developments exercised reasonable care in storing the system for the winter, the need to rely upon White Pass drivers would never have arisen.

INTERVENING THIRD PARTY

Unexplained skidoo tracks were found in the general area of the tank farm. No evidence suggests that the unkown skidoo riders dug up valves or tampered in any manner with the fuel system.

Of all possible explanations for the open valve on the 10,000 gallon filler tank, the evidence clearly favours finding the valve had never been closed over any theory that an intervening third party opened the valve.

GOVERNMENT OFFICIALS

The Controller of Water Rights, Mr. Whitely, in his letter of February 26, 1980, to Mr. MacRae of Placer Developments, made reference to the plans for Placer Development's storage tank facility. In February 1981, Mr. Lengerke, a water resource planner, relayed to Placer Developments the views of Mr. Whitely:

> "Placer Developments Ltd. are to be complimented in the way they have conducted their operation and surveillance program from a water resources point of view."

This correspondence supports the following observations:

a) The activities of Placer Developments caused this Government department to believe Placer Developments were responsible for the operations at Howard's Pass.

b) The fuel storage system met the standards required by the Department in charge of water rights.

Mr. McAlpine, the Water Rights Administrator, although aware of the plastic pipe used to transfer fuel made no comments concerning the plastic pipe nor did he address what was required to prudently prepare the fuel system for winter.

Pursuant to the *Gas Handling Ordinance 1972* Chap. G-5, Y.T.O., Mr. Jackson, an inspector appointed under this Ordinance, had the authority and responsibility to inspect fuel storage and transfer systems such as the system found at Howard's Pass. Although the fuel system was inescapably obvious to anyone visiting the camp, during the course of his inspections of camp facilities, Mr. Jackson did not inspect the fuel storage or transfer system.

Mr. Kittle, from the Environmental Protection Service, visited the camp in 1980, but inspecting fuel storage systems at that time was not his responsibility!

A number of relevant Government officials should, and could have inspected the fuel storage and transfer system. Any professional inspection, attuned to the need to pinpoint possible environmental risks, would have discovered the patent deficiencies in the fuel system. Government inspectors had the responsibility, expertise and opportunity to discover the risks. Had they done so, the evidence forcefully suggests Placer Developments would have responded promptly to make any changes required to accommodate Government recommendations.

What legal significance flows from the laxity, oversights, or negligence of Government officials?

The failure of Government officials to properly exercise statutory responsibilities to inspect or take preventive action will not excuse any accused who acts negligently or who has full knowledge of the facts. (*R. vs. Spa[illegible] Cheese Ltd.* (1981), 10 C.E.L.R. 128 @ 138.)

Neither specific condoning of the accused's conduct by Government officials nor an intimation that no prosecution will attach to the accused's conduct will exonerate a negligent accused. (*R. vs. Wells Foundry Ltd.* (1980), 9 C.E.L.R. 141.)

In assessing whether the accused has acted diligently, the actions of Government officials are only relevant if such actions directly or indirectly cause the accused to reasonably believe appropriate care has been taken. All circumstances must be considered. A due diligence defense cannot stand alone on the actions of Government officials. Any person choosing to operate in an activity placing public safety or the environment at risk, must possess the necessary expertise to conduct that activity safely. No person can completely abrogate this requirement for expertise and for operating safely by relying on the actions of Government officials.

Reliance on specific instructions from Government officials does not constitute a defense if a reasonably prudent person, would question the implied or explicit advice from Government officials.

In many instances, corporations may possess more knowledge about the specific environment and nature of operations than the Government department. Any reason to question Government actions should be brought clearly to the attention of the Government agency before adhering to advice or directions that are known to be deficient. Upon exhausting all reasonable attempts to refute the wisdom of Government directions, if in complying, an accused causes harm to the environment, the foundation for a possible defense arises. However, in the final analysis, the question must be asked notwithstanding the conduct of responsible Government departments, did the accused, in applying the expertise required by the circumstances, act with all due diligence?

In this case, the conduct of relevant Government departments was significantly less responsible than the legislature intended in setting out statutory powers of inspection, and unfortunately, below the standards necessary to enable responsible corporations to safely conduct their affairs. The deficiencies of Government officials, arising largely from what they failed to do, does not exonerate the accused. To the extent the accused was lulled into complacency by Government officials, the remedy lies in mitigation of sentence, not in denying liability. The accused's role in this remote northern mining operation, required the accused to possess sufficient expertise to ascertain without Government help, the risks posed by any fuel storage and transfer system.

F) Proof that Placer Developments Existed as a Legal Entity

After Crown and defence closed their case, the defense submitted the charge must be dismissed as the Crown had failed to prove beyond a reasonable doubt that:

a) A legal entity by the name of Placer Developments Ltd. existed, and

b) That the legal entity falls within the prohibited class under s.32(2) of the Fisheries Act.

At no time during the trial, had the Crown provided the usual method of proof of a corporation by presenting in evidence the requisite corporate documents from the Registrar of Companies.

Throughout the proceedings and evidence, numerous references are made to the accused, Placer Developments Ltd. Defense counsel appeared and acted throughout the proceedings on behalf of Placer Developments Ltd. as named in the Information. Three witnesses testified they worked at the site in question for the accused. Receipts and other documents tendered in evidence by both Crown and defense counsel refer to the named accused corporation. Mr. Morganti who testified for the accused, was a senior geologist on site for the accused and is specifically referred to in the contractual agreement between Placer Developments and Harrison Pacific as the designated engineer for the accused with powers of general supervision over the work at the site. The contract tendered as an exhibit which governs the work at the camp, states the accused corporation is owner of the mine site. A water license to operate at the site is made out to the accused. The correspondence reporting the spill is from the accused.

At no time throughout the hearing was the identity of Placer Developments in dispute. In the absence of formal proof of the legal existence of the corporation named in the Information, can other evidence be relied upon to establish the legal existence of the corporation?

In charges of theft, the failure of the Crown to prove the corporate status of the owner of goods as alleged in the Information, will not be fatal if there is adequate evidence of the existence of the corporation, and the failure to prove the identity of the corporation with greater precision has not misled or prejudiced the accused in the preparation or presentation of his defense. (*Little and Wolski vs. R.* (1975), 52 D.L.R. (3d) 1 @ 6; *R. vs. Pelletier* 1970, 3 C.C.C. 387.) The legal identity of an accused warrants greater concern than proof of the legal status of a corporate owner of stolen goods. However, when there is ample evidence clearly pointing to the corporate identity of the accused, and the absence of formal proof has not misled or prejudiced the accused in the preparation of presentation of his defense, the need for formal proof may not be required to establish beyond a reasonable doubt the legal entity of a corporate accused.

In this case, nothing in any of the evidence raises any doubt about the legal status of the corporation. In the face of all the evidence pointing to the identity of the accused, there is no significant prejudice to the accused in finding the Crown has proved the legal status and identity of Placer Developments Ltd.

In the alternative, the circumstances warrant permitting the Crown to re-open solely for the purpose of providing the requisite formal proof:

a) Formal proof of the legal existence of the accused entails entering the requisite documentation from the Registrar of Companies. Proceedings will not be unduly protracted by this straightforward formal proof.

b) The matter being proved, in light of all the other evidence, is essentially a matter of form. (*R. vs. Huluszkiv (1962)*, 27 C.R. 386 @ 390; *R. vs. Champagne* 1970, 2 C.C.C. @ 273.)

c) Identity was not in issue throughout this case. The accused has not shown how re-opening may prejudice his defense or constitute a surprise or other unfair consequence.

d) No dishonest motive characterizes the oversight of the Crown. Re-opening of the Crown's case pursues an honest purpose in rectifying an innocent oversight on a matter of form or procedure.

e) Not to allow the Crown to re-open may allow an inadvertent oversight on a matter of form or procedure to defeat the ends of justice. (*R. vs. Huluszkiv* (supra); *R. vs. Assu (1982)*, 64 C.C.C. (2d) 94; *R. vs. Robillard* (1978), 21 N.R. 557 @ 561.) Matters of procedure and form are important and cannot be taken lightly, but innocent mistakes of form or procedure posing no prejudice to the accused, ought not deny a just determination on the merits of the case.

f) A decision to allow the Crown to re-open must be exercised judicially. (*R. vs. Dunn* 1970, 3 C.C.C. 424.) On all matters governing a decision to re-open, the burden on the Crown is much more onerous once the defense has closed its case. (*R. vs. Huluszkiv* (supra) @ 390.)

On all the facts of this case, the interests of justice sustained the Crown's motion to re-open to prove the legal existence of the accused's corporation.

Once the trial was re-opened, the Crown called the Deputy Registrar of Companies. Through the Deputy Registrar, the Crown tendered certified copies of the corporate documents of Placer Developments through which the Crown attempted to establish Placer Developments existed as a legal entity in the Yukon. Through confusion or oversight, the Crown failed to provide the accused with a requisite notice pursuant to s. 30(7) of the *Canada Evidence Act* R.S.C. 1970 c. E-10. While some doubt encumbers the ability of the Deputy Registrar to tender into evidence the corporate documents, if I am wrong in admitting the documents through him, the circumstances justify waiving the notice and inspection requirement of s. 30(7). Both parties were notified by the Court several weeks prior to the re-opening of the case that the Crown was permitted to re-open solely to establish formal proof of the corporation. The documents tendered by the Deputy Registrar come from the office of the Yukon Registrar of Companies. The documents are not unknown to the accused nor kept in an unknown or inaccessible place. I am satisfied in the circumstances of this case the notice and production requirements of s. 30(7) have been sufficiently met to justify waiving the notice and production for inspection requirements of s. 30(7).

The tendered documents are accepted in evidence as proof of the legal entity of the accused Placer Developments Ltd.

On all of the evidence, I find the accused guilty as charged.

POSTSCRIPT

The unnecessary anguish and extra costs imposed upon the accused by the inadvertent errors plaguing the Crown's proof of the identity and status of the corporation, must not be without remedy. Costs may be addressed by counsel, but the law relating to costs may restrict the remedy to some form of mitigation in sentence.

SENTENCING

Offences involving oil spills in remote wilderness terrain are usually sanctioned by severe penalties. Severe penalties are necessary to deter others and to articulate society's abhorrence of such crimes.

In sentencing environmental offenders the need to encourage voluntary reporting of pollution, and to encourage aggressively positive rehabilitative steps must not be ignored. Further, very exceptional circumstances about the offence and offender may warrant a change from the severe punishments usually imposed.

In this case the following exceptional circumstances affecting both the crime and the offender established the mitigating circumstances justifying a departure from usual sentencing practices;

1. Spill Reported

   The offender immediately reported the spill. Undoubtedly, had the offender not reported, the authorities would never have known of the spill.

2. Company's Co-operation

   Throughout all phases of the government's investigation, the offender was extremely co-operative. This co-operation continued throughout the trial. (The offender assisted in finding and making available any witnesses the Crown required.)

3. Cause of the Spill

   As indicated in reasons for judgment, the offender was not solely responsible for the pollution. The actions of two other companies significantly contributed to the underlying causes of the offence. Both of the other companies involved, had they properly exercised the opportunity and expertise available to them, could have prevented the spill.

(In a similar fact situation in the future, it may be necessary to determine the relevance of contributory negligence in assessing an appropriate sentence.)

4. Corporation's Operation On Site

The offender did not attempt to save operating costs by employing inferior materials, or by cutting corners in its operation and hiring practices.

As this case involves questions of responsibilities not previously litigated, the offender has not flouted established standards of prudent operations.

The gravamen of the company's culpability flows not from sins of commission but from sins of omission in failing to prepare the site for winter closure.

5. Government Inspectors

The negligence attributed to the offender was in part induced by the laxity of government inspectors, especially Territorial Government inspectors. If proper inspections had been carried out, the offender could have been alerted to deficiencies in his operation. In the past the offender responded without hesitation to all government directions and suggestions.

6. Crown's Conduct of the Case

During the trial, the Crown forgot to prove the corporate existence of the offender. Upon reopening their case, the Crown's method of proof entailed additional problems precipitating further argument and Court time. Throughout these extra Court hearings there were reasonable grounds for the position taken by the offender. The Crown's handling of the prosecution imposed unnecessary extra litigation costs upon the offender. These costs can be considered as mitigating factors in assessing an appropriate penalty.

7. Remorse

The presence and testimony of senior corporate executives amplified counsel's submissions of corporate remorse, reinforced the company's expressed desire to avoid similar offences in the future, and indicated the corporation's appreciation of the seriousness of environmental offences.

8. Subsequent Actions by the Offender

The offender has diligently attempted to institute procedures to avoid similar problems in the future, and has invested in costly preventive measures at the mine site. Most of these changes are not required by law.

The corporation has established new internal procedures designed to enhance the sensitivity of their decision making process to environmental problems.

A check list of safety measures has been developed to serve as a Guide or Aide Memoire for persons working in remote mining camps.

A senior corporate official has been assigned to regularly review scientific publications in order to keep the company apprised of new developments concerned with environmental issues.

All these steps attest to the genuine corporate concern for protection of the environment.

9. Corporate Consent to a Section 33 Order

During the course of sentencing submissions, counsel for the Crown and for the company agreed to an order pursuant to s. 33 in lieu of any other sentencing sanctions. Both Crown and the corporation made extensive submissions about the contents of an order. It is important to note the company's willingness to accept the responsibility imposed by an order, and to note the corporation's continued spirit of co-operation in developing appropriate terms under the order.

Fully aware the sentence of this Court would be minimal, the corporation consented to be bound by a Section 33 Order. Unquestionably the work required by the company in meeting its responsibility under this Order will be far more costly than any fine that might have been imposed. Further, the public will derive far greater benefits from the completion of this order than from any other punishment the Court might have imposed. (For instance, small companies lacking the offender's expertise will be invaluably assisted by the manual required by the Section 33 Order.)

The offender's willingness to produce a manual pursuant to a Section 33 Order coincides with the extensive voluntary public service activities often undertaken by this company.

In most sentencing cases the Courts must sternly admonish corporations for abusing the special privileges they enjoy as corporate entities. This corporate offender is a most welcomed exception. The evidence at the sentencing hearing was singularly directed to one conclusion; the offender has acted in accord with the highest standards of corporate citizenship; their conduct has been exemplary.

If the law permitted, a discharge would appropriately suite the circumstances of this offence and offender. Based on the agreement of counsel a fine of $1.00 and the following conditions of an Order pursuant to s. 33(8) of the *Fisheries Act* are imposed.

Finally, I am grateful for the combined efforts of Crown and Defense Counsel in exploring this innovative and purposeful sentencing alternative.

I trust the spirit of co-operation prevalent in Court will characterize the project through to completion. The success of this project will encourage subsequent Courts to adopt other positive, (and less onerous) uses of s. 33(7) Orders.

There is much unexplored potential in s. 33(7) Orders to serve the best interests of the public and all parties than in the negative character of other sentencing options.

TERRITORIAL COURT OF YUKON

REGINA v. PLACER DEVELOPMENTS LTD.

STUART, Terr. Ct. J. Whitehorse, January 2, 1985

P. Hodgkinson, for the Crown.
B. Ward, for the Accused.

ORDER PURSUANT TO SECTION 33(7)

Pursuant to s. 33(7) of the Fisheries Act, R.S.C. 1970 F-14, the Company is required to do the following:

1. Prepare a manual covering the common environmental problems encountered in northern inland mineral explorations in the Yukon and Northwest Territories.

2. The Manual shall cover environmental problems and environmental concerns arising from all phases of exploration work, including the operation and maintenance of an exploration site that is actively engaged during the exploration season over a number of years.

3. Appendix "A" of this Order contains an outline of the Manual which provides a guide for the subject matter to be covered in the Manual. In following the guide, the company is not expected to exhaustively cover every topic, but is expected to be sufficiently comprehensive to include the most common problems, and the more important relevant information on the topic.

4. A first draft of the entire Manual shall be filed with the Court by April 1, 1985.

5. A final version of the Manual shall be completed by the company in accord with the Court's instructions based on examining preliminary drafts.

6. The final version shall be completed within three months of the Company receiving the Court's instructions for the final version of the Manual.

7. The final version must be approved by the Court.

8. Once approved, the Company shall file the original and three copies of the Manual in the Court within 30 days of approval by the Court of the final version.

9. Throughout the preparation of the Manual the Company shall consult with the Federal Department of the Environment.

10. Either party may, upon ten days written notice, have the contents of this Order reviewed by the Court.

The completion of this Manual should assist all operator's involved in exploration work in the North and will be particularly helpful to small operator's lacking the in-house expertise found in larger corporations. Further this Manual should assist the Federal and Territorial Governments in developing prudent environmental practices by all mining operations.

The Crown has played a principal role in shaping this unique sentencing disposition. As the Federal Department of Environment has been consulted by the Crown, and has acquiesced in the production of this Manual, it is hoped that the Department of the Environment will co-operate with the Company in completing this Manual. It is particularly important that the Federal Department of the Environment:

a) advise the Company of all relevant material they have or are aware of;

b) provide helpful suggestions on the content and format of the Manual;

c) allow the Company to quote or use relevant Government publications in the Manual, and thereby waive any copyright;

d) assist if necessary in securing the co-operation of other relevant Federal and Territorial agencies in providing information to the Company and consenting to its reproduction in the Manual.

The Company is required to absorb the cost of producing an original of the Manual in a professionally publishable form and three copies. Any further distribution or publication of the Manual lies entirely with the Federal Department of the Environment. The Federal Department of the Environment will have the right to publish additional copies upon whatever terms and conditions they deem appropriate.

GUIDE OUTLINE FOR THE MANUAL

EXPLORATION PERMIT AND IMPACT ASSESSMENT MANUAL

I. Jurisdictions Covered by Manual

1. Yukon
2. N.W.T.

II. Permits Required for Exploration

1. Staking Licence
2. Notice of Work - Bond Posting Requirement
3. Reclamation Permit - Notice of Abandonment (N.W.T.)
4. Water Authorization
5. Land Use Permit
6. Explosives Permit
7. Building Permits for Permanent Structures
8. Access on Private Land
9. Environmental Overview or Impact Assessment for Significant Disturbances

III. Areas of Environmental Impact from Exploration Activities

1. Cut Lines
2. Diamond Drill Sites
3. Roads
4. Trenches
5. Claims
6. Airstrips/Helicopter Pads
7. Adits, Open Pits, Waste Dumps
8. Fuel Storage Areas
9. Transportation of Fuels by Land to Remote Mining Sites
10. Use of Fuel During Operations
11. Winter Storage Procedures for Fuel

IV. Site Assessments

1. Forested Areas
2. Alpine Areas
3. Lakes
4. Swamps
5. Stream and River Banks
6. Tundra
7. Inhabited or Agricultural Land
8. Archaelogical Sites
9. Areas Identified as Sensitive
10. Flora and Fauna

V. Suggestions

1. Working with Government Departments
2. Operational Procedures
3. Procedures for Seasonal Closure of Camp

VI. * List of Relevant Federal and Yukon Statutes and Regulations concerned with the transportation by land, the use and storage of fuels in inland mining operations located in the Yukon

VII. ** Bibliography of important published works on environmental problems of northern inland mining operations.

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* In listing relevant Statutes, the material should be indexed by subject matter. The list need not be exhaustive, but should give all the obvious and important statutory requirements.

** This Bibliography is not to be exhaustive, but merely to include the commonly relied upon and important works.

BRITISH COLUMBIA COUNTY COURT

R. v. CITY OF QUESNEL

PERRY, Co. Ct. J. Quesnel, January 5 & 6, 1987

***Fisheries Act*, R.S.C. 1970, c.F-14, section 33(2) as amended - Depositing a deleterious substance into water frequented by fish - Crown appeal allowed - Chlorine into Baker Creek - Actions by persons unknown - Lack of due diligence established.**

Sentencing - Mitigating factors - Delay in communicating knowledge of spill to city officials by fishery officials - Dealing with a municipal corporation making no profits - Total fine of $6,500.00 levied for 2 counts.

The crown appealed the acquittal of the accused from two counts under section 33(2) of the *Fisheries Act* R.S.C. 1970, c.F-14 as amended, depositing a deleterious substance into water frequented by fish.

Upon notification from an individual, a fishery official walking upstream along the banks of Baker Creek on the evening of August 29th, 1985 smelled chlorine emanating from the waters of the creek. Samples obtained from Baker Creek indicated a higher concentration of chlorine in the stream on the 30th of August 1985 than was measured at the same location on August 29th, 1985 at ten o'clock in the morning. Two hundred dead fish were also observed.

It was determined that a valve used to control the release of chlorine into the system had been tampered with by vandals. The valve was contained in a chlorine blower room behind a door that was kept unlocked.

The trial judge acquitted the accused on the grounds that the defence of due diligence had been made out. Evidence was tendered demonstrating that the accused had erected around the sewage treatment plant a six foot high chain link fence with four strands of barbed wire running above.

Held, the appeal was allowed, and the accused was convicted on both counts.

The Court held that the door to the chlorine blower room afforded no security whatever, or ever has, since habitually the door was left in an unlocked position. "The result is that the situation at the time was and has indeed been for sometime previous that a person who has scaled the fence finds it a very simple matter indeed to get into the chlorine blower room by simply opening the door." The court held that this constituted a lack of due diligence on the part of the City.

Upon sentencing, the Court considered the following as mitigating factors:

1. There was a delay of a day until word of the chlorine concentration in the creek got through the channels to city officials, with the result that the valve was shut off and the additional chlorine that the vandal had caused to be put into the system was rectified.

2. It was an act of carelessness and certainly not willfully committed.
3. It is a municipal corporation involved and as such it is the taxpayers who have to pay.
4. It is a municipal corporation, which does not earn any profits and it is not a commercial venture.

The Court levied a fine of $5,000.00 on count one and $1,500.00 on count two.

John D. Cliffe, for the Crown (Appellant).
John Schmitz, for the Accused (Respondent).

PERRY, County Ct. J.

I am quite satisfied that this appeal should be allowed. The reasons are that I agree with the analysis of this case that has been made by Mr. Cliffe on behalf of the Crown and the authorities which he has cited.

Very simply there was evidence in this case which showed that the door to the building in which the very deadly substance, chlorine, was located was open and that there was an open window and in my mind it was error on the part of the learned trial Judge to disregard those factors in coming to the conclusion as he did that the defence of due diligence was made out. It would appear that he concentrated his thoughts with respect on the fact that there was a six foot high fence, but the evidence showed that it would not really have been any difficulty for somebody to scale that fence and of course common sense would impel that conclusion.

On the basis of the authorities which have been cited to me, this case seems to be quite clear. It is a rather startling picture in fact to read of the lack of reasonable care that was displayed by the City, I'm sorry to say, in this instance and in my view and I repeat for the reasons and based upon the arguments of the Crown in this case that the appeal must be allowed and a verdict of guilty will be entered on both counts.

Now I will hear you as to sentence.

(PROCEEDINGS ADJOURNED TO JANUARY 6, 1986 FOR SENTENCING)
(PROCEEDINGS RESUMED JANUARY 6, 1987)

SENTENCING

The City of Quesnel has been found guilty by this court of two counts under the Federal Fisheries Act as follows, Count 1: on the 29th day of August, 1985, at the City of Quesnel, Province of British Columbia did unlawfully deposit or permit the deposit of a deleterious substance, chlorinated sewage in waters frequented by fish, to wit: Baker Creek at the sewage treatment plant outfall from the City of Quesnel sewage treatment plant no. 2 in violation of section 33(2) of the *Fisheries Act*, thereby committing an offence contrary to section 35(5)(b) of the *Fisheries Act*. Count 2: on the 30th day of August, 1985, at the City of Quesnel, Province of British Columbia did commit the same offence described in the same language, contrary to section 33(5)(b) of the Fisheries Act.

The material facts are not really in dispute. The City owned and operated a sewage treatment plant which was built in 1966 known as the City of Quesnel Sewage Treatment Plant No. 2 located on Lewis Drive in West Quesnel. At the time in question referred to in the counts the City's work superintendent was Mr. Max Helzel whose duties include supervision of all outside workers and the operation of the sewage treatment plant. Mr. Lloyd Phoenix was the City operator of treatment plant no. 2. The plant was bounded by a chain link fence and it was bordered by a City of Quesnel compound yard on the north; a Toyota car dealership on the south; by Lewis Drive on which residences were located on the west; and, by the waters of Baker Creek on the east. Baker Creek is a tributary of the Fraser River. The chain link fence with four strands of barbed wire above it was a total heighth of six feet. I found on the evidence it would not be much of a problem for an unauthorized person or vandal to scale this fence by standing on a vehicle parked near it or by other means which readily come to mind.

Now in reality this offence constituted the only significant security measure in respect of the sewage treatment plant. There is a single gate permitting entry to the compound which is within the fence. Within the fence there is a compound and the important feature for present purposes in the compound and which concerns us is the concrete chlorine building which contains the chlorine which is mixed with the sewage. After treatment, the clorinated sewage goes to an outfall pipe and flows into Baker Creek. That is to say, the plant discharges chlorinated sewage into the creek. There is a door into this blower room building. Behind the door is a chlorine tank or cylinder with a valve or dial at the top whereby chlorine is supplied to a chlorination tank from a chlorine bottle. During the usual operation the resulting chlorinated sewage is not lethal to fish.

The crux of this matter concerns the door by which entry is gained into the chlorine blower room. On the outside of this door is a sign saying "danger" and some other words but apart from that indication which is not a physical item of security, of course, the door affords absolutely no security whatever and never has. This is because the door is kept unlocked. There is a latch on the door which is seen in the photographs but the evidence showed that habitually the door was in an unlocked condition. So that the result is that the situation at the time was and has indeed been for sometime previous that a person who has scaled the fence finds it a very simple matter indeed to get into the chlorine blower room by simply opening the door. Additionally there is a window on the side of the building three feet by three feet which on August 29th and 30th was wide open. The situation which I have described to my mind constituted a lack of due diligence on the part of the City and for that reason I allowed the appeal by the Crown in this case.

On August 29th and 30th, 1985, the waters of Baker Creek were frequented by fish that included salmon, rainbow trout and suckers. As I have earlier mentioned, Baker Creek flows in a southerly direction to a confluence with the Fraser River. The plant's outfall is approximately four hundred yards upstream from the confluence of Baker Ceek and the Fraser River. Between 4:00 p.m. on August 29th and 10:00 a.m. on August 30th the plant discharged heavily chlorinated sewage into Baker Creek by way of the sewage treatment plant outfall. The only reasonable inference to be drawn from the evidence is that some vandal, who has yet been undiscovered, got over the fence; walked into the blower building, very likely through the door; and turned the valve two full turns thus releasing extra chlorine into the system. There was evidence that there was a previous instance of vandalism of a similar nature. The particulars of that occurrence were not disclosed but that is not significant. I am assuming it is something of the same nature. No steps were taken by the city after that previous occurrence to make any changes at all. I will be pointing out later on, however, that changes have certainly now been made as a result of what happened on August 29th and 30th. The Royal Canadian Mounted Police were notified and the City of Quesnel has offered a reward for the discovery and conviction of the culprit.

On August 29th at approximately 6:30 p.m., Mr. Richard Conwick, who is a Quesnel radio announcer and his wife were walking along the bank of Baker Creek at a location one hundred yards upstream from the confluence of Baker Creek and the Fraser River. At that time Mr. Conwick could smell a faint odor of sewage eminating from the water of Baker Creek. Mr. Conwick walked a further two hundred yards upstream on Baker Creek and observed approximately fifty dead and dying fish. The largest fish observed by him was an eight to nine inch trout. At 7:30 p.m. Mr. Conwick reported his observations to Fisheries Officer Randy Nelson.

On August 29th at 8:15 p.m. Fisheries Officers Voysei and Nelson of the Department of Fisheries and Oceans attended to Baker Creek at a location approximately on hundred yards upstream from its confluence with the Fraser River. While walking upstream along the banks of Baker Creek, Fishery Officer Voisei smelled chlorine emanating from the water of the creek. The ultimate event was that there were two hundred fish killed as a result of the chlorine getting into the stream. There was, I'm going to mention this a little later, but after the Fisheries Officers became aware of this problem there was a delay before the city officials were notified as to what occurred. I am going to come back to that in a moment.

At 10:00 o'clock in the morning of August 29th Mr. Phoenix, who I earlier mentioned, had taken a water sample from Baker Creek approximately one hundred feet downstream of the sewage treatment plant outfall. The sample was found to contain chlorine in an mount less than .5 milligrams per litre. On August 30th, 1985 prior to terminating the plant's discharge after he found out about this matter, Mr. Phoenix took a similar sample from Baker Creek at the same location as the sample he had taken on August 29th and this sample was found to contain chlorine in the amount of 3 milligrams per litre. So it is from that circumstance that we find the extent of the chlorine that got into the stream.

On August 30th, 1985 at 4:30 p.m. Mr. Zirnhelt of the British Columbia Waste Management Branch of the Ministry of Environment took water samples from Baker Creek at locations upstream of the outfall, one hundred feet downstream of the outfall, two hundred yards downstream of the outfall and at the confluence of the creek with the Fraser River. Those samples did not contain any chlorine. I am told that the chlorine, even at low levels, is toxic to human beings and I have refferred to the proximity of residences, etc., to the plant and it is also toxic to the environment. I am further told that one milligram of chlorine in water is lethal to fish over a period of twenty minutes.

I turn now to the section of the act under which the city was charged, reading as follows:

> "Any person who contravenes any provision of subsection 2 of section 33(5) is guilty of an offence and liable on summary conviction to a fine not exceeding $50,000.00 for a first offence and not exceeding $100,000.00 for each subsequent offence."

That is an illustration and tells us in very clear language of the seriousness with which the Parliament of Canada today regards pollution. A number of cases were referred to me by learned counsel for the Crown. I am not proposing in this case to refer to the cases. They are on record should they need to be referred to by any higher court and the message that come through from the cases that have been decided and certainly by our Court of Appeal is that pollution is a serious matter. In this case the Crown has recommended that they be fined on the total not less than $10,000.00.

I had earlier referred to the situtation in the creek the next day and in plain language that means that by the next day, as Mr. Schmitz has point out, the creek had flushed itself clear of chlorine. The further fact is that of the two hundred fish which I previously mentioned, fifty percent of those were suckers and suckers are regarded as a useless fish. Now then, the crown has of course stressed the circumstances which I have outlined and the seriousness of the offence and I have given certainly consideration to that submission. I agree as I must agree that pollution of this description is a serious matter. Now Mr. Schmitz on behalf of the city has spoken ably and omitted nothing as far as I can see in respect of the mitigating factors and there are mitigating factors in this case. First of all, the city has no previous record of this kind of offence at all. In regard to count 2, there is a special point that requires mention which I earlier touched upon and said I was going to come back to. The facts in this regard which learned counsel for the defendant has mentioned in the course of this argument are that Fisheries Officers Nelson in the evening of August 29th contacted a Conservation Officer in Quesnel with the request that he contact the Waste Management Branch of the Provincial Government, who for this area as I understand the situation, is located in Williams Lake. Now Fisheries Officer Nelson it must be stated and this apparently is not in dispute, he did not know there was an upstream treatment plant. As it turned out it was not until the next day that the word got through the channels with the result that the valve was shut off and the additional chlorine that the vandal has caused to be put into the system was rectified. Mr. Schmitz submits and I agree that if the city had known about this in the evening of August 29th after it was first discovered, well, the city I am perfectly satisfied would have through Mr. Phoenix dealt with it immediately. I am told that the maximum amount of chlorine that would have got into the creek had that been done would have been ten pounds, so that I agree with Mr. Schmitz that that is a mitigating factor in respect of count 2 because but for that delay, count 2 would never have arisen. The next point that is made by the city's counsel is that this was not certainly a willful act. It was an act of carelessness. The next point that is made is that we are here dealing with a municipal coporation. I had occasion to mention this is an exchange with counsel earlier this morning and I take it that the Crown's position is that no distinction should be made. I agree that it is a difficult point, but I am rather inclined to the view that one should be somewhat more circumspect when you are dealing with a municipal corporation because the fact is it is the taxpayers who have to pay in cases of that kind and I do observe that in one or two of the cases that were referred to me that the type of corporation who is the offender is a relevant consideration to be kept in mind. I will readily concede that there doesn't seem to be any specific case where the point was made that a municipal corporation might be considered to be in any sort of different position for purposes of mitigation but a municipal corporation of course doesn't earn any profits and it is not a commercial venture and so I give that some weight. The other factor that was mentioned in mitigation in this particular case is that there has been no irreversible damage caused. Certainly there were two hundred fish killed and as soon as possible the matter was rectified.

Now it is an important factor in any case whether it be a corporation or a natural person to ascertain whether any contrition, remorse has been shown. The word remorse is not too apt in connection with a corporation but nevertheless the principal is there. Now in this case I have been advised and it's certainly not in dispute that the City of Quesnel has been dealing with the Waste Management Branch of the Provincial Government and with Cariboo Pulp & Paper Company Limited which is located in Quesnel whereby there will be a joint venture under a scheme where the sewage will be sent to the Cariboo Pulp & Paper system and that there will therefore be an entirely new and presumably as good a system as money can buy to deal with sewage treatment and in this connection the city has passed a bylaw calling for an expenditure of one point nine million dollars. That of course is an effort of the taxpayers of this city as represented by the city council. I am told and it is not in dispute that the hookup will be made within one or two weeks to get this new system into operation.

Bearing then the considerations that have been put to me and which I have considered on each side, I impose the following penalty. On count 1 there will be a fine of $5,000.00. On count 2 there will be a fine of $1,500.00 for a total of $6,500.00.

TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

R. v. ROBINSON'S TRUCKING LTD.

BOURASSA, Terr. Ct. J. Yellowknife, June 21, 1984

***Fisheries Act*, R.S.C. 1970, c.F-14, as amended section 33(2) - Depositing a deleterious substance into water frequented by fish - Oil spill into Cameron River and Ross Lake - Due diligence defence failed.**

Sentencing - Section 33(7) order to take action - Total fine of $5,000.00 levied on two counts.

The accused was charged with two counts under section 33(2) of the *Fisheries Act*, R.S.C 1970, c.F-14 as amended, depositing a deleterious substance into water frequented by fish. The accused had a large trucking operation delivering diesel fuel oil from Yellowknife to the Lupin Gold Mine on a winter road approximately 400 miles long. Both incidents involved inexperienced drivers who were sent on their way without any briefing as to road hazards, oil spill response techniques, or emergency procedures.

At Cameron River, following the overturn of a tractor tanker, approximately 3,600 gallons of fuel oil escaped onto the snow and ground and flowed downhill into the river both over and under the ice. Evidence of fuel oil contamination was found in fish and in downstream areas of the river. At Ross Lake a tractor tanker rolled at a curve and spilled approximately 2,000 gallons onto the surface of the ice road and under the snow.

Held, the accused was convicted on both charges under section 33(2).

The Court found that diesel fuel oil was a deleterious substance within the meaning of the Act and that the Cameron River and Ross Lake are frequented by fish.

The *actus reus* is the depositing of fuel oil in water frequented by fish. The accused had at least three opportunities to avoid the prohibited act; namely, preventing rollovers, preventing spills or leaks after a rollover, and preventing oil from reaching the water by clean up on the ice or by a paper landbase containment procedure.

At Cameron River, the defendent had no equipment on site to drain the tanker prior to righting without spillage. The actions were completely *ad hoc* demonstrating a complete absence of forethought or response to the obligations imposed by the *Fisheries Act*. The defendent had not so much as a shovel or a few meters of plastic with which a containment could have been built to prevent the spilled oil from flowing downhill into the river.

At Ross Lake, the defendent made a catchment basin but nevertheless substantial quantities of fuel escaped. The Court ruled that for the purposes of the Ross Lake incident, oil on the ice is in the water within the terms of section 33(2).

Having regard to all of the circumstances, including the fact that rollovers and accidents are inevitable, the absence of driver briefing or training, the potential risk to the environment based on the sheer volume of oil transported, the inevitability that spilled oil will enter the rivers and lakes, the absence of any readily available salvage equipment which would have prevented both of the incidents, and the ineffectual clean-up measures, the accused did not prove due diligence.

The Court levied a fine of $2,500.00 on each of the two counts and a section 33(7) order was granted. The accused was ordered to equip each tractor tanker unit with a shovel, with plastic sheeting for use as a catchment basin, and with devices or materials suitable to enable the immediate sealing of tanker air vents. The defendent was to designate a corporate officer to be on-scene commander for all future oil spills, to identify such other employees as might be required in the environmental response team, and to train such employees.

With regard to granting a section 33(7) orders, the Court must have a factual base, either by way of evidence at trial or the sentence hearing. The Court may contemplate an order which will involve a greater expenditure of money than the maximum fine, provided that the order is addressed to the likely prevention of further such offences. Willful refusal to comply with an order of the Court pursuant to section 33(7) may constitute an offence under section 116 of the *Criminal Code*. Alternatively, a willful refusal to comply with a section 33(7) order may very well amount to contempt of Court. Further, a refusal, negligent or otherwise, to comply completely with such an order would constitute a gravely aggravating factor with respect to sentence for a further offence.

G. Bickert, for the Crown.
G. Lang and
D. Searle, Q.C., for the Accused.

BOURASSA, Terr. Ct. J.

The Defendant, Robinson's Trucking Ltd., is convicted of two charges pursuant to Section 33(2) of the Fisheries Act.

Charge No. 1:

That on or about the 1st of March 1983, and the 2nd of March, 1983, at or near kilometre 54 of the Ingraham Trail, Northwest Territories, did deposit or permit the deposit of a deleterious substance, namely fuel oil, in water frequented by fish, or in a place under conditions where such deleterious substances may enter such water, namely the Cameron River, contrary to Section 33(2) of the *Fisheries Act*.

Charge No. 2:

That on or about the 7th of March, 1983, at or near Ross Lake in the Northwest Territories, did deposit or permit the deposit of a deleterious substance, namely fuel oil, in water frequented by fish, or in a place under conditions where such deleterious substance may enter such water, namely Ross Lake, contrary to Section 33(2) of the *Fisheries Act*.

Because of its importance in terms of the ultimate disposition of these cases, I should commence these reasons with some observations and conclusions I have made after hearing all of the evidence, particularly that of the Defendant's president and namesake.

The Defendant is basically a family operated business which apparently only recently has become involved in the oil transportation business on the winter road to Lupin on the scale that has been described to me in the evidence. As such, it has perhaps not been exposed to the relatively new morality implicit in environmental protection legislation in the same way that multi-national corporations with their mega-projects have, so often the target of environmental pressure groups or special environmental hearings. It is my view that the Defendant's business expanded as it did without any real awareness or appreciation of how our law has, in effect, expanded with respect to the obligations placed on those whose enterprise entails a risk to the public. The Defendant simply did not direct their concerns or attentions to this aspect of its business, and was blind to the increased responsibility placed upon it by virtue of the increase of size and nature of its enterprise. To a degree this is understandable, but of course, not an excuse. It does, however, in my consideration, demonstrate a virtual absence of risk taking or criminality of conduct, and those factors should not therefore be considered in sentencing this accused.

I trust the experience of these proceedings which have been going on for a lengthy period of time will cause the Defendant to priorize its obligations and responsibilities to the environment in recognition that it and it alone must protect the environment and the public from the risks inherent in its business.

The standard of care that rests on this particular Defendant is, in my assessment, a high one, a conclusion I arrive at after considering the flexible standard of care described by Stuart, C.J., Yukon Territorial Court, in *R. vs. Gonder*, C.J., Y.T.C. 62 C.C.C. (2d) 326:

> "Reasonable care implies a scale of caring. Reasonableness of the care is inextricably related to the special circumstances of each case. A variable standard of care is necessary to ensure that requisite flexibility to raise or lower the requirements of care in accord with the special circumstances of each factual setting. The degree of care warranted in each case is principally governed by the following circumstances:
>
> a) gravity of potential harm,
>
> b) alternatives available to the accused,
>
> c) likelihood of harm,
>
> d) degree of knowledge or skill expected of the accused,
>
> e) extent the underlying causes are beyond the control of the accused."

It is given that tanker truck rollovers are inevitable; while these accidents may be reduced, they cannot by definition be eliminated. However, in the cases before me the *actus reus* of allowing the oil to enter the waters was clearly preventable, using existing, inexpensive technology and a minimum of skill in its application. All of the matters that have been brought to the Court's attention in the trials are completely within the control of the Defendant. I note as well that these two convictions represent first offences for the Defendant, and I treat them both as such, however, the fact that this was the first full year of operation on this particular winter road, and the very size of the contract in terms of the quantity of fuel to be delivered, qualifies the impact of the first offender argument to a degree. The Defendant simply should have been better prepared.

SENTENCING

These cases invite a consideration of Section 33(7) of the *Fisheries Act*, a matter which Counsel have addressed, and I propose to embark upon.

> "Section 33(7):
>
> Where a person is convicted of an offence under this section, the Court may, in addition to any punishment it may impose, order that person to refrain from committing any further such offence, or to cease to carry on any activities specified in the order, the carrying on of which, in the opinion of the Court, will or is likely to result in the committing of any further such offence, or to take such action specified in the order in the opinion of the Court will or is likely to prevent the commission of further such offences."

In the cases before me the Defendant has offered to undertake certain measures and consents to an Order, pursuant to Section 33(7) in the following terms:

1. The Defendant, within six (6) months from the date hereof, (or within such additional period of time as the Court may, upon application by either the Informant or the Defendant, deem appropriate) and, in consultation with the appropriate Federal and Territorial environmental government authorities (within the Court, upon application, will determine should disagreement exist between the Informant and the Defendant), shall prepare and file with the Court a Contingency Plan acceptable to the Court for dealing with fuel spills resulting from the rollover of tanker trucks, which containment and recovery of the spilled fuel and the prevention of its entry into waters frequented by fish; AND

2. The Defendant, as a result of the development of the Contingency Plan referred to in (1) above, within such further period of time as this Court may direct, shall dedicate equipment and materials, to be available on a stand-by basis to enable a prompt response to be made in the event of further fuel spills; AND

3. The Defendant, as part of its corporate organization, shall appoint a person to be the "On-Scene Commander" for future fuel spills and shall further provide to such person and to such other employees as may be designated by the Defendant to be part of a "Response Team" such training as may be appropriate in the circumstances.

Crown Counsel argues that a deterrent penalty is called for, and further, that such Orders (Sec. 33(7) - Order to Refrain or Order to Take Action) should be confined to simple matters easily verified, easily executed, and of a meaningful nature.

It appears that this Subsection has only been resorted to on two (now three) occasions: Huddart, County Court Judge in *R. vs Jackson Brothers Logging Co.* Ltd., 14 C.C.C. (3rd) 1, and by the British Columbia Provincial Court in *R. vs Federated Co-Operatives Ltd.*, unreported, December 16, 1971, where in each case on consent of Crown and Defence, an Order was made for the construction of certain works designed to prevent a continuation of *Fisheries Act* offences. Finally, there is the case of *R. vs Placer Developments Ltd.*, Yukon Territorial Court, Stuart, C.F., Sentencing Unreported

(January 2, 1985), again where the Defendant consented to the making of an Order pursuant to Section 33(7).

Clearly, consent of the Defendant or Counsel is not a prerequisite for the invocation of the power contained in Section 33(7); however, the input of Counsel is vital if such an Order is contemplated. It is critically so when a matter proceeds directly to a guilty plea and the Court does not have the benefit of all of the evidence that is available in a full trial.

In exercising its 'option' the Court, of course, must have a factual base, either by way of evidence at trial or the sentencing hearing. The Court's opinion cannot be a capricious one based in unknown variables or factors that are not before the Court and the parties.

In my view, the Court may contemplate an Order which will involve a greater expenditure of money that the maximum fine, provided of course that the Order is addressed to the likely prevention of further such offences. By way of example, an Order to clean up a large oil spill would undoubtedly involve more than $50,000, the maximum fine for a first offence, yet in my view it would be entirely consistent with the objectives of Section 33(7).

An Order to Refrain or to Take Action may logically be used to place the environment back in its original state before the occurrence of the environmental mishap, that is to say, restoration as used in the civil context where a Court intends to return the parties to where they were before the cause of action arose.

The enactment directs that an Order shall be made in addition to any fine and cannot be imposed alone. (See *R. vs Jackson Brothers Logging Co. Ltd.*, 14 C.C.C. (3rd) 1). Clearly then, the considerations involved in imposing an Order do not involve an either/or, or one or the other situation. A fine should still be imposed after an assessment, using all the various factors described in the law to date. To do otherwise may be to invite Defendants to await conviction before taking the steps and spending the money required of them by law and then offering to do so in mitigation. As Territorial Court Judge Ayotte, as he then was, stated in *R. vs Echo Bay Mines Ltd.*, N.W.T. Territorial Court, April 25, 1980, Unreported. "The legislation is not intended to encourage compliance after an environmental mishap, but rather to demand compliance before those mishaps occur so as to prevent them". And further, "Courts must be prepared to impose sentences which contain a strong deterrent element, notwithstanding laudable conduct by the Defendant, either after the fact or in related areas before the fact."

In my view, there can be no better remedy than to right the wrong in a physical sense (by way of an Order to Take Action), and to deter further wrongs (by way of the imposition of a fine).

Willful refusal to comply with an Order of the Court made pursuant to Section 33(7) may constitute an offence under Section 116 of the *Criminal Code*.

> "Section 116:
>
> Every one who, without lawful excuse, disobeys a lawful order made by a Court... is guilty of an indictable offence and is liable to imprisonment for two years."

With respect to a corporation, of course, that would mean an unlimited fine would be available by way of penalty. Alternatively, a willful refusal to comply may very well amount to contempt of Court.

Should there be a refusal, negligent or otherwise, to comply completely with such an Order to Refrain or an Order to Take Action, and that became a factor in a further offence, then upon conviction such conduct would constitute a gravely aggravating factor with respect to sentence.

Finally, I would suggest that the contents of an Order pursuant to Section 33(7) must not be such as to give the Defendant the impression or belief that compliance will act as a defence to a charge arising out of further mishaps. It must be reiterated that the obligation lies solely with the Defendant to comply with the law by whatever means circumstances dictate. An Order to Refrain or an Order to Take Action carries with it no warranties, express or implied.

With respect to the application of Section 33(7) to this Defendant in these cases, I do not contemplate for a moment an Order directing the Defendant cease transporting oil over the winter road. That would be completely inappropriate, as the risks that have been described to me in the trials are manageable both before and after a mishap.

With respect to an Order to Take Action, where the facts of the case demonstrate, as they have here, that the risk of further offences is a real and continuing one, and the remedy is a simple and straightforward one, carrying with it the probability that its application will or is likely to prevent further mishaps, the Court should exercise its discretion and make an Order.

In this case the evidence is clear. In each incident the first flow of contaminating oil was from the tank hatch-cover air vents. They could have been closed with something as simple as a wooden wedge, had it been available at the time. I am advised today that special covers are available that are designed to seal those vents at a cost of approximately $4,000 per tanker.

I note as well that the majority of the spilled oil, after coming from these vents, reached the waters because, secondly, the Defendant had not equipped its trucks with any kind of containment equipment, not even so much as a shovel or some kind of plastic for deployment as a catchment basin or dyke, which could have been done by the driver on the scene while awaiting salvage equipment.

I note as well that aggravating the spill was the time delay involved in obtaining assistance, which would have been eliminated or substantially reduced had the trucks involved each been equipped with proper radios.

A lack of training or route familiarization for the drivers involved in both incidents was also a factor. And finally, I note that there was a total absence of easily available off-the shelf equipment suitable for removing the oil from an overturned tanker without further spills.

I conclude that if the Defendant had been able to seal the vents and had had proper equipment for draining the overturned tankers, the spills described to me would not have occurred and offences would not have been committed.

I believe that based on the above facts I may properly order the Defendant to:

1. Equip all his tankers, as well as those hired by him, with proper sealing hatches;

2. To equip each truck with suitable emergency equipment, including products which are designed to seal cracks or splits in the seams of tankers;

3. To equip all trucks on the route with VHF or HF radios in order to facilitate immediate communication in the event of an emergency;

4. To designate and dedicate oil spill recovery equipment;

5. To designate and train personnel to deal with environmental mishaps.

However, I am constrained from making such an extensive Order for a number of reasons. The Defendant has impressed me as an honest, capable, and sincere individual, attempting to meet the newly discovered obligations upon him. Such an Order may involve an intervention in the Defendant's business which is beyond that which is called for in light of this attitude and the lack of criminality I have referred to. The problem, although a continuing risk, can be met by simple existing technology, and the Defendant has taken some steps in that regard; notwithstanding this, the facts and circumstances involved call for immediate action by the Defendant to prevent the risk of further environmental mishaps. The risks involved in further delay in implementing remedial action is too great, and given that the remedial action involved is so straightforward and simple, I believe it would be proper to make an Order.

I do, therefore, exercise my discretion under Section 33(7) and order the Defendant to take the following action:

1. To equip each tractor-tanker unit involved in the carrying of fuel oil on the Lupin winter road with,

    a. a shovel,

    b. a quantity of plastic sheeting sufficient and suitable for the use and deployment as a catchment basin or dyke in the event of an emergency,

    c. such devices, tools or materials as are suitable to enable the immediate sealing of tanker air vents. I leave it to the discretion and judgement of the Defendant as to what he is going to use, be it as simple as a wooden wedge, or as complicated as the $4,000 hatch cover that was earlier described.

2. To designate, as offered by the Defendant in its submissions, a corporate officer to be the on-scene commander for all future oil spills, and such other employees as may be required for participation in the environmental reponse team, and to train such employees as is appropriate under all the circumstances.

With respect to the assessment of any fines which must be imposed in addition to that Order, I have balanced the factors normally considered in these matters, and having regard to this particular Defendant, and the circumstances of the cases before me, I am satisfied that fines at a modest level are called for and sufficient to meet the goals of deterrence. In each case, with respect to the Ross Lake offence and the Cameron River offence, there will be fines of $2,500, being in total $5,000, and in default, distress.

TERRITORIAL COURT OF NORTHWEST TERRITORIES

IN THE MATTER OF SUBSECTION 33(7) OF THE FISHERIES ACT, R.S.C. 1970, C. F-14 as amended.

BETWEEN

HER MAJESTY THE QUEEN

and

ROBINSONS' TRUCKING LTD.

BOURASSA, Terr. Ct. J. Yellowknife, December 21, 1984

ORDER PURSUANT TO SUBSECTION 33(7) OF THE FISHERIES ACT

UPON THE DEFENDANT having been convicted for offences as follows:

> On or between the 1st day of March, 1983 and the 2nd day of March, 1983 at or near Kilometre 54 of the Ingraham Trail, in the Northwest Territories, did deposit or permit the deposit of a deleterious substance, namely fuel oil, in water frequented by fish, or in a place under conditions where such deleterious substances may enter such water, namely the Cameron River, contrary to Section 33(2) of the Fisheries Act.
>
> and,
>
> On or about the 7th day of March, 1983, at or near Ross Lake in the Northwest Territories, did deposit or permit the deposit of a deleterious substance, namely fuel oil, in water frequented by fish, or in a place under conditions where such deleterious substance may enter such water, namely Ross Lake, contrary to Section 33(2) of the Fisheries Act.

AND UPON THE DEFENDANT having been ordered to pay fines of $2,500.00 for each offence, for a total of $5,000.00, in default, distress;

1. IT IS HEREBY ORDERED that the Defendant Robinsons' Trucking Ltd. equip each tractor and trailer unit, involved in carrying fuel oil on the Lupin winter road, with:

    a) a shovel;

    b) a quantity of plastic sheeting sufficient and suitable for the use and deployment as a catchment basin or dyke in the event of an emergency; and

    c) such devices or tools or materials as are necessary to enable the immediate sealing of tanker air vents, the type of devices, tools or materials being in the discretion and judgment of the Defendant.

2. IT IS FURTHER ORDERED that the Defendant, as offered by the submissions of its counsel, designate:

   a) a person to be an on-scene commander for future oil spills, and

   b) such other employees as may be necessary for part of a spill response team, with training as may be appropriate in the circumstances.

ALBERTA PROVINCIAL COURT

R. v. SUNCOR INC.

DIMOS, Prov. Ct. J. Edmonton, May 25, 1985

***Fisheries Act* R.S.C. 1970, c.F-14, as amended, section 33(2) - Depositing a deleterious substance into water frequented by fish - Oil and grease into the Athabasca River - Accused contends inaccurate measurement techniques applied, substance not proven to be deleterious and due diligence was exercised - Defences fail - Accused convicted. - Total fine of $30,000. levied.**

The accused was charged with two counts under section 33(2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, depositing a deleterious substance into water frequented by fish.

The Crown alledged that the accused permitted the release of plant effluent, the major portion of which was "oil and grease", through their wastewater treatment system into the Athabaska River.

Pursuant to a Provincial license to operate, the accused was granted the right to obtain water from the Athabasca River for the express purpose of extraction and hydraulic cleaning of plant cokers. This water was then to be returned to the River under the said licence which also set levels of permissible contaminants.

Analysis of waste water samples obtained at a weir in the treatment system close to where the treated water is discharged into the River, on or about the dates outlined in the information, indicated substantial concentrations of oil and grease.

The defence contended that measuring techniques used to determine the amounts of oil and grease deposited in the River, were inaccurate, both as to their manner of measurement and also as to their calculation in total. Further, they argued that the substance or substances deposited in the River were not deleterious and also that the accused had shown all due diligence in preventing the escape of oil into the River and also in cleaning up the resulting spills.

Held, the Court found the accused guilty of the charges.

The Court found that deposits made by the accused into the Athabaska River on February 17th and March 9th, 1982 contained oil and grease concentrations in excess of 10 parts per million at the weir thereby constituting the major and dominant contaminant in the effluent. It was concluded that such concentrations were likely to be deleterious to fish. The Court accepted that the analyses were fair representations fo actual "oil and grease" contained in the tested samples. While the defence had submitted that mass discharge figures given by Suncor to the Environmental Authorities were also inaccurate, the Court held that the evidence had suggested that these figures were "substantially correct", and that to suggest otherwise was to speculate.

Reliance was placed on expert testimony suggesting that the concentrations of oil and grease would cause sublethal effects to the fish swimming in the plume within several hundred metres from the outfall. Further, the Court found that depuration of the fish to be predicated upon having the organism placed in "clean water" as opposed to water that is consistently being injected with hydrocarbons, as was the situation herein.

The Court held that the effluent on the particular dates in question would not pass the standard lethality test, which meant that more than 50% of the fish would be killed in a 96 hour bioassay, this being the basic consideration used in considering whether the effluent of a conventional refinery is acceptable.

The Court found that by a combination of inexperience, delay and failure to obtain outside expertise, the accused did not exercise due diligence. A further lack of an attempt to consider cleaning up the Athabaska River on first being made aware of the leakage or to seek expert advice on the problem, or even to contemplate that there would be oil under the ice, surprised the court.

This accumulation of oil under the ice should have been expected and it is notable that the situation which transpired with Suncor operations in the year 1982 appeared to be a repeat performance of a similar situation that had occurred at the plant site.

DIMOS, Prov. Ct. J.

In these proceedings, Suncor Inc. was charged with two counts in one Information, alleging violations of the *Fisheries Act* R.S.C. 1970 Chapter F-15 and amendments thereto, on February 17th, 1982 and March 6th, 1982. Informations were originally sworn on the 19th of March 1982, the first appearance being at Fort McMurray on April 21st, 1982. Subsequently, the matters were transferred by consent to the Provincial Court in the City of Edmonton, and as there were to be any expert witnesses called, arrangements had been made to obtain daily transcripts, so that evidence given on a particular day would be available by 5 p.m. on the same day, and this was most helpful to counsel in their subsequent cross examination. The original court time anticipated for hearing this trial was a period of three weeks, and obviously the estimate by counsel as to time required was miscalculated. The matter commenced before me on October 17th, 1983 and at that time, defence counsel advised of a number of preliminary applications prior to the commencement of hearing evidence, these being three applications for dismissal on the grounds of (a) "issue estoppel relating to Count 1", (b) "abuse of process", and (c) delay, being an application under Section 11 (b) of the *Charter of Rights*. Several days were taken up with respect to argument on these various matters and in the result, I gave judgment dismissing each of the applications which will be found at pages 114 to 140 of the transcript. Subsequent to this dismissal, an application was made in the Court of Queen's Bench of the Province of Alberta for certiorari and prohibition and these applications were made before MacDonald J. who again heard argument on all of these matters. In the result his Lordship sustained the position that was taken by me and the 3 applications were dismissed. Subsequently, the defence abandoned any further appeals relative to "abuse of process", and "delay" under Section (11)(b) of the *Charter of Rights*, but launched an appeal on the matter of "issue estoppel" before the Court of Appeal of the Province of Alberta and that particular defence application was subsequently dismissed. Approximately ten days of the original allotted time had transpired with respect to these preliminary applications in this matter, and subsequently I commenced hearing evidence on October 27th, 1983.

The case involved the calling of some 49 witnesses, many of whom were expert witnesses and some of international stature in their particular field. The original time period set for the hearing was October 17th to November 4th, 1983 but due to the time taken for preliminary applications I was only able to complete a few of the witnesses by November 4th and the matter was then put over to another date and court time was made available between December 13th, 1983 and January 27th, 1984. Thereafter additional time was required and the case was again put over to the next conveniently available court date being April 16th, 1984 to June 13th, 1984 at which time the trial was completed. The court clerk advises that the total number of court days taken is approximately 76, exclusive of days taken in other courts. Space and availability of court reporters and witnesses were naturally factors requiring consideration in the setting of the original court dates and the subsequent adjournments.

After hearing evidence, lengthy arguments and rebuttal arguments were submitted by counsel in writing and on December 9th, 1984 I received what I had perceived to be the final written argument of the crown but a further short supplementary argument was filed by the crown on March 26th, 1985. The case was long and complicated but before engaging in a consideration of legal argument, I will first set out a description of the Suncor plant and refer to the events leading up to and following the alleged breaches of the "*Fisheries Act*". Thereafter I will consider the various matters under the headings and in the basic progression as set out in the defence argument, the crown having used a similar approach in their replying to the defence argument.

THE PLANT AND PROCESS

The Defendant, Suncor Inc., which I will hereinafter refer to as Suncor is a Corporate body resulting from an amalgamation of Great Canadian Oil Sands Limited and Sun Oil Company Limited. Great Canadian Oil Sands Limited originally proposed to the Alberta Government in the early 1960's to construct and operate a large scale commercial plant to recover oil from the Athabasca tar sands.

On obtaining approval, the company proceeded to construct an oil sands plant as Tar Island, some 35 miles north of Fort McMurray, downriver from the town, its main contractor being the Bechtel Corporation. Construction started in early 1964 and operations commenced on or about the 30th of September 1967. In 1978, permission was granted to expand the capacity of the plant to 3,770,000 cubic metres per day and at the time of alleged offences, the plant occupied an area extending over many hundreds of acres and employing a site work force of approximately 1800 persons. The Athabasca tar sands are a deposit of bitumen bonded to sand which lies in strata in various depths throughout the region. The Suncor operation was designed to recover the bitumen by strip mining the oil sands and extracting the bitumen by a hot water process development by Dr. Karl A. Clark the normal process first requiring the removal of the overburden, thus allowing the strata of bituminous sand to be worked by bucketwheel excavators, and it was then fed to a conveyor system. The mining operation itself is a very large scale venture but has not direct application to the charges which are before the court. (It should, however, be noted that is is a continuing process and that it is not possible to shut down the supply of oil sand to the plant, for anything other than a short period of time without bringing the entire process of the plant to a halt.) Moreover, evidence was given that the wastewater pond would overflow its banks in approximately 36 hours under normal conditions, so that as long as process water was being used, the water taken in must go back to the river.

Once the oil sand is put on the conveyor belt it is then fed to the top of the extraction plant from which it drops and thereafter it goes into drums in which steam and various chemicals are added in what is referred to as the primary extraction plant. From there, the mixture is pumped to the final extraction plant where the bitumen is diluted with naphtha which is one of the products of the plant and is used as a diluent in order to allow the butimen to be handled at relatively low temperatures. From the extraction plant the now diluted bitumen is fed to a tank farm and from there to a diluent recovery plant. This plant is a two-stage system that is apparently peculiar to oil sands recovery operations. Its function is to remove the naphtha, the diluent of the bitumen, from the mixture leaving the basic bitumen stock available for the next part of the process. To this is added a small part of recovered oils from other portions of the process which are reintroduced into the cycle. This mixture then goes to a coker charge drum where it is heated to between five hundred and fifty and six hundred degress Fahrenheit and it is thereafter fed to the coker furnaces. There are four of these furnaces and each of them has two coke drums and they are direct fired heaters, normal to any refinery that has cracking operations. The oil leaving the coker furnace is between nine hundred and ten and nine hundred and fifteen degrees Fahrenheit, and after being heated it is charged into the bottom of one of the eight coke drums each of which are 96' tall. The coking process is a cyclic operation known as a delayed coking operation. The normal operation cycle for a coke drum is twenty-one hours producing large amounts of coke in one drum for each cycle. When a full load of coke has been deposited in one drum the feed from that petroleum coker furnace is routed to another drum and the first drum is first quenched with steam and water following which the coke is removed from the drum by use of water at high pressure. This process has removed the free carbon from the mostly bitumen coker feed and the balance from the top of the coking drum is fed to the refinery. This feed is then directed into a large fractionator tower which separates naphta, kerosene, gas oil, and the heavy recycle or slurry oils as liquid streams, and a wet gas stream. This stream of gas together with methane is used in the unifining section of the plant to produce hydrogen. The hydrogen is compressed and fed to the three unifining plants where the fractionated products are mixed with hydrogen and passed over a catalyst in which the sulphur and nitrogen compounds are converted to ammonias and hydrogen sulphide from which in further processes sulphur is produced in the form of elemental sulphur. There are four products from the unifiners, unifined naphtha which is low sulphur naphtha, unifined kerosene, also low sulphur, and low sulphur gas oil and a fourth stream trade-named "cascade kerosene" being a railroad engine fuel. These four streams are blended and put into the pipeline for distribution.

It must be remembered that all these processes from the coker through the refinery are carried out using materials at very high temperatures and at considerable pressures. Throughout all this area there is what is referred to as a "flare" system which is primarily a system of escape valves and piping which allows the release of any of the materials being processed to the flare system where they can be burned off to avoid explositions or leaks. This is basically a safety valve system and works on automatic pressure relief valves where any pressures over and above those proper for the process, result in the material escaping in the flare system for disposal. This occurs at the flare stacks where the system feeds into a drum from which the liquids can be recycled and the gaseous material can be burned off in the flare stacks. It is to be noted that if a safety valve fails to operate, there are no alarms or warning system which may direct an operation to a specific valve or location, but of course failure of the valve might result in a condition of upset with respect to the operation of the plant.

Pursuant to its "Licence to Operate" granted by the Province of Alberta under the provisions of the "*Clean Water Act*" Suncor was granted the right to obtain water from the Athabasca River for the necessary processes of extraction and hydraulic cleaning of the cokers and this water was to be returned to the Athabasca River under the said licence which set out levels of permissible contaminants. The water treatment system allowed for initial treatment of the water pumped from the river for use in various areas of the plant. After use, the water from the extraction plant is directed through a system known as an API separator in which the water is allowed to flow slowly down a long rectangular path and then into an open pipe or channel known as a skimmer, which by design was meant to recover the surface oil, and the main flow of water would be directed under a baffle and over a weir from where the flow would go into retention ponds and thence to the wastewater pond. The wastewater pond also received a flow from the ash pond through a settling pond which consists of water from the coke fired boilers in the power plant and further receives water from an additional pond known as the flare pond (due to its being adjacent to the flare stacks) which receives water from the coking operations, previously referred to, where the coke drums have been quenched and stripped of coke by water under high pressure. During the clean up operations necessitated by the fires and the upset plant condition the flare pond was taking an emergency overflow from the knockout drum in the flare system which normally would have been routed back to the API separator.

It is also to be noted that the wastewater pond was a very large body of water of approximately 45 acres according to the evidence, and was designed to allow all the various streams of streams of water from different sources in the plant to slowly flow towards the Athabasca River. Theoretically the retention time for the effluent to flow in and out of the wastewater pond was 10 days, but some streams closer to the discharge point may short circuit and come out of the wastewater pond in 36 hours.

The wastewater pond had apparently since its original construction contained a number of dead tree stumps still rooted in the bottom. There was no artificial means of aeration or movement of the water. At the river end of the wastewater pond there was a dyke which contained five of six decant lines controlled by valves which allowed the water to flow into a small pond known as the duck pond. These decant lines were not only below the water surface but on the wastewater pond side of the dyke, and were bent downwards so that their ends were considerably below the normal water levels of the wastewater pond. The duck pond itself is a relatively small pond measuring approximately forty feet by twenty feet and from there the water would pass under a concrete baffle and over a weir, from whence it was discharged by pipe into an outflow in the Athabasca River. Sitting over the weir is a small steel building known as the metering shack in which flow measurement instruments are sited as well as water sampling instrumentation. It was from this source that the readings and samples were obtained and following analysis in the Suncor laboratory, the reports required by the Clean Water Licence issued by the Province of Alberta were filed.

In addition to the conventional flow of effluent to the river through the wastewater system, there was a further water system known as the "closed cooling water system" which was intended to contain clean water which would recirculate through the refinery. There is a facility in this system for what is known as the "once-through operating mode", and in the summer this particular system is not in heat balance and there is provision for a discharge directly to the Athabasca River, where the flow would meet up with the effluent flow from the wastewater pond at a point a short distance from the river and then proceed into the river through the outfall.

The discharges that could be made to the Athabasca River were set out in a licence issued by the Department of Environment of the Alberta Government which defined daily maximum limits and monthly average limits and these are reproduced as Section 3.1 of Licence 78-WL-080, being Exhibit 9 in these proceedings:

SECTION THREE: LIQUID EFFLUENT STANDARDS

3.1 The release of water contaminants in the liquid effluent discharged to the Athabasca River from the wastewater storage pond shall be controlled so that the following levels of water contaminants are not exceeded.

Water Contaminant	Mass Discharge Per Day	Average Mass Discharge Per Day
Chemical Oxygen Demand	6330 Kilograms	4220 Kilograms
Phenols	12.7 Kilograms	8.4 Kilograms
Sulphide	11.3 Kilograms	3.8 Kilograms
Ammonia Nitrogen	215 Kilograms	136 Kilograms
Oil and Grease	420 Kilograms	210 Kilograms
Total Suspended Solids	1055 Kilograms net (1)	420 Kilograms net (1)
	1475 Kilograms net (2)	845 Kilograms

NOTE:

(1) Permissible during the period October 1st to February 28th of each year.
(2) Permissible during the period March 1st to September 30th of each year.

It should be noted that the Defendant was also required to measure the background levels of oil and grease in the river on each day that it was required to report, normally every third day, and could deduct those levels from the amounts that their tests showed to be discharged into the river. The method of calculation of the contaminants was to take water samples based both on flow and time, measure the amount of the contaminant in the sample and multiply the result by the measured flow to obtain a mass discharge figure for the day. These results were required to be reported to the Department of the Environment on a monthly basis.

It is also to be noted that the "closed water loop" was to be monitored when in the once-through cooling mode and certain requirements were to be reported to the Department of the Environment.

The Amendment to Licence No. 78-WL-080 dated November 26, 1980 requiring further reporting reads as follows:

1. The following clause is added to Section Four:

   4.7 The licensee shall institute monitoring and operational control procedures on the once-through cooling water system in order to detect and rectify contaminant leaks of, in particular, sulphide and oil and grease, in the manner described in the licensee's submission dated November 6, 1980.

2. The following subclause is added to clause 5.2:

5.2 (k) Results of the monitoring procedures specified in Clause 4.7 with a report on the cause and correction of any contaminant leaks.

In view of the difficulty that might be met eventually in referring to specific ponds and particular parts of the Suncor operation, the court took a view of the plant. After completing this I could not help but be struck by the magnitude and complexity of this facility which consists of a mining operation and extraction plant, a refinery and a power generator and steam generator plant, and one becomes totally aware of the tremendous amount of materials that are required to be handled under high temperature and high pressures in all kinds of weather conditions and it was thereafter much easier to conceptualize the difficulties faced by Suncor in pioneering these methods and in applying this new technology to oil sands extraction.

FACTUAL SITUATION GIVING RISE TO THE PRESENT CHARGE

The expansion of the plant, licensed in 1978, was scheduled to come on stream in the summer of 1981 and during the whole of 1981 difficulties were encountered with the wastewater system, finally leading to the environmental authorities arranging for a November 1981 meeting with Suncor. The original licence and the modified licence after expansion, both required reporting to Alberta Environment on the water quality each month, tests for which were taken every third day. Evidence was led that there had been some difficulty with compliance through a considerable period of the plant's history and it was apparent from the evidence of both Mr. Johnson and Mr. Kostler that on many occasions the limitations set out under the "Clean Water Act" were being exceeded. The winter of 1981-82, was admittedly severe and Suncor experienced a series of fires that had a cumulative effect on the plant's ability to operate although problems with the wastewater system obviously existed prior to any fires. On December 21st, 1981 a fire in the flare area did fairly extensive damage to the flare system and among other things damaged the pumps used for pumping material from the knockout drum in the flare system to the API separator. In addition, a floating oil skimmer on the flare pond was damaged beyond repair. As a result of this, vacuum trucks were required to take material from the knockout drums and from the flare pond to the API separator instead of being able to pump it there. On January the 20th, 1982, there was an explosition and major fire in the unifiner compressor complex which not only destroyed the compressor complex but forced an immediate emergency shutdown of the unifiner plant. The result of the shutdown of the unifiner plant was that all material within that complex went into the flare system as an emergency release. It was later discovered that one of the pressure safety valves involved in this operation failed in an open position, this being the safety valve of the diluent recovery unit, so that diluent continued to flow into the flare system for some time. Because of the previous fire which had damaged the flare area, much of this material escaped into the wastewater system either directly into the flare pond as an overflow from the knockout drum or into the adjoining wastewater pond by discharge directly out of the flare stacks. On January 21st, 1982 in the early morning, there was a major fire on the wastewater pond involving a large proportion of the surface in which one witness described the flames as being three hundred feet high. The fire was of such dimensions as to force the shutdown of the coking operation for fear that the entire plant would be destroyed. It was evident at that time that a large amount of oil had escaped to the wastewater pond during the fire of the previous day and in the aftermath a considerable amount of oil was observed still on the pond. At this point the evidence is that at least 50% of the wastewater pond was still covered with ice. It must be remembered that although the ambient temperatures during the period were extremely low, often in the minus forty-degree Celsius range, the steam feeding into the wastewater pond was often of quite high temperatures with the result that the ice coverage was never complete during the winter and in mild weather would tend to disappear very quickly. During the following several weeks the staff at Suncor attempted to deal with the oil on the wastewater pond by using vacuum trucks to remove any pockets of oil that would be blown into areas close to the edge but little or no regard was paid to the oil under the ice although much of the surface oil was taken off. By the middle of February the ambient temperature in the area began to rise from the low levels previously recorded and it was indicated in the evidence that the temperatures had reached forty degrees below zero and subsequently moved up to zero by the 17th of February. This increase, although meaning that the temperatures were still cold would accordingly mean a steady rise in the effluent temperature, as measured at the weir and also according to some of the witnesses, resulted in melting some of the ice previously in the wastewater pond. Since February 9th, 1982 the concentrations of "oil and grease" in the effluent rose substantially and the total mass discharge as calculated considerably exceeded those levels permitted by licence under the "*Clean Water Act*" of the Province of Alberta. The figures showing "oil and grease" concentration and output into the Athabasca River are hereinafter set out an are a compilation of Suncor's wastewater effluent emissions and non-routine analysis as set out in exhibits 16 and 17.

	Oil & Grease	
Feb. 1982	Con.	Kg/Day
2	9.6	292.5
4	8.73	263.1
7	8.89	255.8
9	10.3	335.7
11	28.3	881.6
12	15.3	489.4
13	17.7	562.1
14	32.5	976.8
15	18.7	478.7
16	15.9	412.9
17	*14.9	798.4
18	31.8	615
19	326.7	4081.1
20	78.6	1951.8
21	151.8	5097
22	446.7	21813.1
23	104.8	6351.3
24	29.4	882.5
25	15.3	538.6
26	10.6	517.6
27	35.6	212
28	15.4	414

*C & G Labs

	Oil & Grease	
Mar. 1982	Con.	Kg/Day
1	13.6	736.7
2	16.0	1044.2
3	14.0	571.3
4	17.9	702.7
5	8.41	305.3
6	54.30	1923.9
7	18.78	733.64
8	21.1	836.3
9	24.6	952.6
10	20.2	796
11	24.0	1036.6
12	18.7	826.1
13	25.4	1124.9
14	23.0	1023
15	23.6	1030
16	22.4	1004.0
17	17.3	766.9
18	17.57	732.3
19	11.45	477.2
20	17.05	731.3
21	20.1	886.4
22	15.2	642.7
23	14.6	65.3
24	14.7	725
25	10.0	357.7
26	*6.0	*199.6
27	*7.9	*270.6
28	*9.0	*306.6
29	*4.8	*165.7
30	*2.9	* 94.3
31	*7.9	* 69.7

* A discrepancy exists between (Exhibit 22), the Laboratory Daily Environment Report and the non-routine analysis, (Exhibit 16) which was forwarded to the Government by Suncor. These documents showed concentrations of oil and grease for February 17th, 1982 as respectively 15.3 and 25.2 ppm. Mr. Martin gave evidence that the gross figure set out in Exhibit 22 was correct, that is 15.3 ppm being the total amount of oil and grease less background level of .4 ppm resulting in a net of 14.9 ppm of oil and grease and that he determined this error subsequent to the date of analysis and advised Mr. Kossler of Alberta Environment. The Crown did not deny that this was so reported.

The concentrations of various substances are expressed in parts per million or milligrams per litre, and it is those concentrations multiplied by the flow over the weir for the twenty-four hour period which give rise to the readings in kilograms per day. None of these readings apparently gave any particular concern to the employees of Suncor but there evidently were some outside concerns, for on the 12th day of February 1982, one Beth MacCallum, a Habitat Biologist, noted that there were orange substances on the ice adjacent to the Suncor plant and these substances extended downstream beside an open channel near the Suncor plant, the colour of which was similar to that shown on Exhibit 5. The stain could still be seen the following day and again on the 14th of February as this biologist was flying over the territory. The situation continued on the 15th day of February and MacCallum then called Wendland a Fish and Wildlife Officer and advised him of the staining and on February 16th Wendland attended at the Suncor Plant where he contacted Mr. Martin and they observed a large quantity of oil in the wastewater pond, also in the duck pond and there as a sheen of oil in the river. To quote evidence Wendland said:

> p. 417 "No, I couldn't really tell the thickness. It was more than a sheen. It was - it seemed to be reasonably thick. I couldn't say whether it was an inch or just exactly what it was."
>
> p. 418 "There was oil in certain areas of the duck pond. There was a sheen that covered a considerable portion of the duck pond, a thin layer of oil or a sheen. Along the sides there was a build-up of oil."
>
> p. 419 "Looked at the open water. At that time we could see a sheen of oil on the open water."

He also advised that the ice at the edge of the lead was rotten and stained with oil of an orange colour and that gobs of oil would come out from underneath the ice. On February 17th, Wendland returned to the site and took various samples, both from the duck pond and another which proved to be largely oil taken from the surface of the wastewater pond adjacent to the dyke by the duck pond. It was this sample that figured in many of the experiments that were brought into evidence in this case. On March 9, 1982 Wendland again went out with Bob Martin from the Suncor plant and did further sampling.

FURTHER FACTUAL MATTERS FOR CONSIDERATION

It is apparent that the Information refers to acts done on the two days in question, namely, the 17th day of February 1982 and the 9th day of March 1982. Normally, in considering offences alleged on specific dates evidence as it relates to other dates may be purposeless and for that matter irrelevant. However, this particular case requires a consideration of "deleterious effects" on fish, and particularly sublethal effects and the part played by such matters as bioconcentration, uptake and depuration, toxicity, taint, etc. the effect of which may not necessarily begin on or be completed on a particular date. Therefore I must consider the totality of what transpired both before and after the two specific dates set out in the Information in order to assess the full effect of deposits going into the river and their deleterious effect on fish. Obviously, I am unable through time constraints to consider in writing all of the factual matters which may have arisen herein, but I will hereinafter set out further facts that I feel obliged to consider, and in most instances counsel have led evidence on, or in argument have referred to these facts:

(a) Mr. Kostler, employed by Alberta Environment gave evidence that since the period of the refinery turnaround in June of 1981, the monthly report supplied by Suncor indicated that the plant was experiencing a number of problems with its wastewater treatment system, which resulted in a number of potential breaches of licence. Mr. Johnson, Suncor's Plant Manager, stated that the wastewater system was marginal, at best, and Dr. Sprague, a defence witness having examined all of Suncor's records reached a similar conclusion.

(b) As a result of the deficiencies in the wastewater treatment system, a meeting was arranged to be held in November of 1981 between Suncor and the environmental authorities to discuss wastewater disposal as well as some of the bioassay reporting procedures.

(c) The meeting referred to above was then put over to March 5th, 1982 when it appeared that certain matters were being taken in hand and were to be completed by Suncor, and more time would be required for a solution. Admittedly, these matters for consideration were not of the "quick fix" variety, but matters which were going to be looked at in depth by Suncor in an endeavour to solve their wastewater problems.

(d) During December of 1981 and January and February of 1982 substantial further problems arose requiring immediate attention by Suncor, among them being the disastrous fires of December 21st, 1981, January 20th, and January 21st of 1982. During this particular time, there were admittedly further substantial releases of effluent containing considerable quantities of oil and grease and certainly the mass discharge of oil and grease during that particular period far exceeded the allowed average discharge of 210 kilograms per day of oil and grease with a maximum allowance for an individual day not to exceed 420 kilograms.

(e) On February 2nd, 4th, 7th and 9th of the year 1982, the average daily discharge maximums were exceeded and on the 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th and 26th days of February, both the daily mass discharge and the average mass discharge per day allowed under the licence were exceeded. In the report it will be noted that in February 1982 the average daily discharge was 1,369.5 kilograms per day. In the month of March 1982 and for the first 21 days of that month with the exception of March 5th, when only the average daily limit of 210 kilograms per day was exceeded, all other days had deposits of "oil and grease" which exceeded both the average daily limit (210 kilograms) and the mass discharge per day (420 kilogram). In the result the actual discharge into the river was six times over the allowable limit for February and three times over the allowable limit for March, which would far exceed the allowances under the "*Clean Water Act*".

(f) Faichney observed oil in the water 30 miles downstream on February 27th and 28th, 1982 and he characterized the smell of the water as being similar to that of the Suncor Extraction Plant. A consideration of the evidence of Spagnut who caught fish in the Athabasca on the other than the offence date was also required.

(g) On February 25th, 1982, the Environmental Authorities issued a Water Quality Control Order with respect to Suncor.

(h) Miscellaneous evidence was led as to fluid proceeding through the "closed cooling water loop" on February 18th, 1982 and in mid-April 1982 where there were allegedly discharges of water and/or contaminants to the river resulting from a failed valve requiring consideration as to whether the "cooling water loop" was operating in the open mode during the winter and on the dates of the charges herein, and whether the water therein was clean or contaminated.

(i) Further miscellaneous evidence was heard as to such matters as leakage from the emergency pond, the R-1 drainage system and the effect of a particular dyke leakage allegedly located on or about the end of February, 1982 arising from a broken underground steel culvert, apparently resulting in the effluent bypassing the wastewater underflow pipe.

(j) May 10th, 1982 fish were caught in the Athabasca River which were the subject of taste testing by the York Sensitivity Panel.

(k) June 1st, 1982 the fish plant on the Athabasca River did not open as the fish had an off taste which was not at the time specifically attributable to any particular source.

(l) Subsequent to the end of March, 1982 the wastewater system was completely revampled by Suncor, resulting in consistent lower levels of oil and grease.

(m) June 1983, the fish plant on the Athabasca River was capable of being opened but did not open due solely to marketing problems and not an "off taste" in the product.

BROAD LEGAL CONSIDERATIONS

In these proceedings Suncor stands charged pursuant to an information alleging the following counts:

Count No. 1

"on or about the 17th day of February, A.D. 1982, at or near Fort McMurray, in the Province of Alberta, did unlawfully deposit a deleterious substance, in water frequented by fish, to wit:

Athabasca River

(2) of the Fisheries Act R.S.C. 1970, Chapter F 14 and amendments thereto and did thereby commit an offence, contrary to Section 33 Subsection 5(b) of the said Statute and amendments thereto."

and:

> Count No. 2
>
> "on or about the 8th day of March, A.D., 1982, at or near Fort McMurray, in the Province of Alberta, did unlawfully deposit a deleterious substance in water frequented by fish, to wit:
>
> Athabasca River.
>
> Contrary to the provisions of Section 33 Subsection (2) of the Fisheries Act R.S.C. 1970, Chapter F 14 and amendments thereto and did thereby commit an offence, contrary to Section 33 Subsection 5(b) of the said Statute and amendments thereto."

The "deleterious substance" specifically alleged to be deposited is "oil and grease".

The charges herein are laid under the provisions of the "*Fisheries Act*" Revised Statutes of Canada 1970 Ch F 14 and amendments thereto. More particularly Section 33 Subsection (2) says:

> "(2) Subject to Subsection (4), no person shall deposit or permit the deposit of a deleterious substance or any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water."
>
> Subsection (4) reads as follows:
>
> (4) No person contravenes Subsection (2) by depositing or permitting the deposit in any water or place
>
> (a) of waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this Act; or
>
> (b) of a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under Subsection (13)."

It is incumbent that we look at some other sections of the "*Fisheries Act*" and consequently I set out Section 33 (11), (12) and part of s. 13.

> "(11) For the purposes of this section and sections 33.1 and 33.2, "deleterious substance" means
>
> (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or or fish habitat or to the use by man of fish that frequent that water, or

(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water.

(12) The Governor in Council may make regulations prescribing

(a) substances and classes of substances,

(b) quantities or concentrations of substances and classes of substances in water, and

(c) treatments, processes and changes of water for the purpose of paragraphs (c) to (e) of the definition "deleterious substance" in subsection (11).

(13) The Governor in Council may make regulations for the purpose of paragraph (4) (b) prescribing

(a) the deleterious substances or classes thereof authorized to be deposited notwithstanding subsection (2);

(b) the waters or places or classes thereof where any deleterious substances or classes thereof referred to in paragraph (a) are

(c) the works or undertakings or classes thereof in the course or conduct of which any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;

(d) the quantities or concentrations of any deleterious substances or classes thereof referred to in paragraph (a) that are unauthorized to be deposited; . . ."

The definition of deleterious substance makes reference to fish, fish habitat and to use by man of fish. These terms are defined as follows:

> "'fish' includes shellfish, crustaceans, marine animals, and the eggs, spawn, spat and juvenile stages of fish, shellfish, crustaceans and marine animals;"
>
> "'fish habitat' means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes."

The use by man of fish is not defined in the Act and is presumably left to its ordinary meaning, namely consumption for food, food for domestic animals, etc.

It is notable that the words "or is likely to be rendered" which I have underlined above were added to the legislation in 1978 and I will made further reference to this later in this judgment.

EFFECT OF THE REGULATIONS

In determining the legal position herein, one might first note that Section 33, Subsections (12) and (13) of the "*Fisheries Act*" provide in broad measure for making regulations and setting out substances, and classes of substance, quantities, concentrations and treatment for the purposes of the various paragraphs in referring to "deleterious substances" and there also arises by regulation and the application of 33(4) of the "*Fisheries Act*" earlier set out, a right to allow a deleterious substance to be put into any water, notwithstanding the absolute prohibition set out in 33(2) of the "*Fisheries Act*". Admittedly, the regulations may have no application "per se" to Suncor, but it is submitted that a consideration of the manner in which the regulations were applied might be helpful in determining the full intent and purpose of the "*Fisheries Act*" or in any event will forcefully point out the concerns voiced by Suncor in their argument.

The "Petroleum Refinery Liquid Effluent Regulations" were passed under the provisions of the "*Fisheries Act*" in 1973 and paragraphs 3 and 4 read as follows:

> "3. The regulations apply to every refinery that has not commenced the processing of crude oil prior to November 1, 1973 and that commences the processing of crude oil on or after that date.
>
> 4. For the purpose of paragraph (c) of the definition "deleterious substance" in subsection 33 (11) of the Act, the following substances are prescribed as deleterious substances;
>
> (a) oil and grease;
>
> (b) phenols;
>
> (c) sulfide;
>
> (d) ammonia nitrogen;
>
> (e) total suspended matter; and
>
> (f) any substance capable of altering the pH of liquid effluent or once-through cooling water."

It is to be noted that in this regulation, oil and grease is described "per se" as a deleterious substance. However, Suncor or similar plants also involved in the extraction of oil from oil sands or coal are excluded from the application of this particular regulation, by virtue of the definition of refinery, which reads as follows:

> "'refinery' means facilities intended primarily for the separation and conversion of crude oil into products, including liquified petroleum gas, gasolines, naphthas, heating oils, fuel oils, asphalts, lubricating oils and greases, benzene, toluene, xylene, hydrogen, sulphur and coke and includes blending, shipping and packaging facilities located on the refinery property and all properties developed for the operation of those facilities, but does not include facilities associated with the processing of natural gas or the production of synthetic petroleum originating from coal or bituminous sands;"

Two further regulations under the "*Fisheries Act*" were subsequently passed, one dealing with crude oil refineries producing crude subsequent to 1973 and the other referring to refineries of crude oil prior to 1973, which I will hereinafter refer to as the "new refineries" and the "old refineries"; these two regulations being known as the "Petroleum Refinery Liquid Effluent Guidelines" and the "Existing Petroleum Refinery Liquid Effluent Guidelines".

These Guidelines are in each case "effluent guidelines" and particularly set out the methods of testing and reporting. Under the "Petroleum Refinery Liquid Effluent Guidelines", s. 4 thereof says under the heading "Objective",

> "4. (1) For the purpose of these Guidelines, refinery liquid effluent and once-through cooling water that is deposited is not acceptable if more than 50% of the fish die in the bioassay sample, when tested according to the bioassay procedure set out in Schedule I."

Thus it appears that under that regulation, the basic test for toxicity is whether or not the effluent sample is able to pass the bioassay test, that is if less than 50% of the fish die in a 100% effluent.

The further regulation which I have referred to as being the "Existing Petroleum Refinery Liquid Effluent Guidelines" deals with "old refineries" and does not refer to "oil and grease" as being deleterious, "per se", but refers to it under the heading "Parameters to be Considered" and under s. 4 of that regulation it says:

> "Parameters to be Considered
>
> 4. For the purpose of these Guidelines, the following parameters will be considered:
>
> (a) oil and grease
> (b) phenols
> (c) sulfide
> (d) ammonia nitrogen
> (e) total suspended matter
> (f) pH
> (g) acute toxicity."

The regulation also deals with methods of calculating deposits from a refinery, and in Section 5 (4) states as the ultimate test:

> "(e) Notwithstanding Subsections (1), (2) and (3), refinery liquid effluent and once-through cooling water that is deposited is not acceptable if more than 50% of the fish die in the bioassay sample, when tested according to the bioassay procedure set out in Schedule VI."

The terms, conditions and requirements attached to Suncor's licence pursuant to the "Clean Water Act", being the act under which Suncor is carrying out its activities, does not specifically refer to concentrations of deleterious substance but does in fact spell out requirements for mass discharges of particular contaminants.

Toxic is therein defined under Section 1.8 which says:

"1.8 'toxic' means, when used in the context of an acute lethal bioassay test, less than fifty percent survival of rainbow trout (Salmo Gairdneri) when exposed to undiluted liquid effluent during the test referred to in clause 4.1(c)."

Under section 3(1), the following is stated:

"3.1 The release of water contaminants in the liquid effluent discharged to the Athabasca River from the wastewater storage pond shall be controlled so that the following levels of water contaminants are not exceeded.

Water Contaminant	Mass Discharge Per Day	Average Mass Discharge Per Day
Chemical Oxygen Demand	6330 Kilograms	4220 Kilograms
Phenols	12.7 Kilograms	8.4 Kilograms
Sulphide	11.3 Kilograms	3.8 Kilograms
Ammonia Nitrogen	215 Kilograms	136 Kilograms
Oil and Grease	420 Kilograms	210 Kilograms
Total Suspended Solids	1055 Kilograms net (1)	420 Kilograms net (1)
	1475 Kilograms net (2)	845 Kilograms net (2)

NOTE:

(1) Permissible during the period October 1st to February 28th of each year.
(2) Permissible during the period March 1st to September 30th of each year."

"4.1 the liquid effluent discharged from the wastewater pond to the Athabasca River shall be:

(a) monitored for volume flow rate in terms of cubic meters per day;

(b) subject to twenty-four composite sampling and analysis for water contaminants according to the following schedule:

Mondays, Wednesdays and Fridays--pH, total suspended solids, phenols, chemical oxygen demand, oil and grease;

weekly--sulphides, ammonia nitrogen, threshold odour number;

monthly--total organic carbon;

quarterly--total heavy metals including Cd, Cu, Ni, Pb, As, Hg, Mn, Co, Cr, Fe, Zn, Se, Ag, V, Mo;

(c) subject to a standard acute lethal bioassay test based on a grab sample and conducted quarterly. Should the bioassay test show toxicity, the test shall be repeated immediately using four concentrations to establish and LC50 value (medial lethal concentration). If the toxicity is confirmed,

> the licensee shall initiate studies to determine the source of the toxic components and take appropriate measures to eliminate the toxic material from the liquid effluent discharge to the Athabasca River.
>
> Note: The detailed test procedure will be forwarded to the licensee by the Standards and Approvals Division of Alberta Environment."

It therefore appears that if one looks at the regulations, both under the "*Fisheries Act*" (if considering conventional crude oil refineries) or under the "*Clean Water Act*", the basic test set out for determining unacceptable levels of toxicity under each individual statute is that of a bioassay of the effluent. This is done by exposing fish to the contaminant in differing concentrations until a dilution is found wich will kill 50% of the exposed fish. The test is usually done over a 96 hour period to determine when the average fish will die and this is commonly referred to as an LC50 which is a widely used and approved method of determining toxicity, and obviously deleteriousness.

It is notable that the refiners of Synthetic Crude such as Suncor as opposed to conventional crude refineries do not appear to be covered, or have the protection provided by the "regulations" when the 50% lethal bioassay standard has been met, although the effluent may admittedly be deleterious.

The bioassay test referred to is an easy test to perform, which does not required great expense in making a positive determination as to an allowable degree of toxicity, and when considering statutory violations under the "*Fisheries Act*" the parties would not normally require the calling of great numbers of expert witnesses, such as was necessitated in this particular case.

In the final result it would appear that these original regulations were intended to set arbitrary guidelines as to what level of toxicity would be tolerated in the effluent, in order to allow an accommodation betwen conventional crude oil refinery operations and the provisions of the "*Fisheries Act*". Anything under that lethality figure of 50% in a full concentration bioassay, although obviously a deleterious substance, would nevertheless be allowable. In one instance, the public concern is fish and fisheries and the use of fish by man under the terms of the "*Fisheries Act*", and in the other, the public concern is "water quality" under the provisions of the "*Clean Water Act*". Nevertheless the fact remains that this is a charge under the "*Fisheries Act*", but Suncor is not a refinery which is subject to or protected by the "*Fisheries Act*" regulations.

WHICH DEFINITION OF DELETERIOUS SUBSTANCE APPLIES TO THE FACTS OF THIS CASE?

Section 33 (11)(a) or (11)(b)

Sec. 33 (11) For the purposes of this section and Sections 33.1 and 33.2 "deleterious substance" means:

(a)

any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(b)
any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a nature state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water.

Counsel suggested that there were various ways in which these sections may be interpreted and I set them out herein.

Mode 1: Section 33 (11)(a) "Deleterious Substance" means;

(a)
any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or the use by man of fish that frequent that water.

Broken down into its constituent elements, it is:

Any substance

that if added to any water

would degrade . . . .

. . . . that water

so that it is rendered

or is likely to be rendered

deleterious

to fish

or fish habitat

or to the use by man of fish that frequent that water

Mode 2: Section 33 (11)(b)

any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water.

Type (a)

Quantity and Concentration

This mode broken down into its elements reads as follows:

any water that contains a substance

in such quantity or concentration

that it would

if added to any other water

degrade . . . .

. . . . that water

so that it is rendered or is likely to be rendered

deleterious to fish

or fish habitat

or to the use by man of fish that frequent that water

Type (b)

Treated, Processed or Changed

This mode broken down into its elements reads as follows:

any water

that has been so treated, processed, or changed, by heat or other means from a natural state

that it would

if added to any other water

degrade . . . .

. . . . that water

so that it is rendered or is likely to be rendered

deleterious

to fish

or fish habitat

or to the use by man of fish that frequent that water

Mode 2, type (b) was thought by counsel to be irrelevant and as I agree with that position, it will not be commented on further. I am therefore obliged to consider Mode 1 and Mode 2, type (a) and the words "any water" as they relate to 33 (11)(a) and "any other water" as they related to 33 (11)(b).

I am of the opinion that the meaning of "any water" in Section 33 (11)(a) is made clear in the judgment of the British Columbia Court of Appeal, *Regina* v. *MacMillan Bloedel* (1979 12 B.C.L.R. 29 at page 33) and I will not further contemplate the meaning of "any water" in that section, unless I specifically conclude that 33 (11)(a) has application herein.

Mode 2, type (a), that is 33 (11)(b) is primarily concerned with the meaning of "any other water" which seemingly has previously had little judicial examination. If the words "any other water" are determined to mean the "receiving water", then further matters must be considered, namely:

where shall this receiving water be looked at; is it

(a) at the end of the pipe where the effluent hits the river, or

(b) some further distance downstream taking into account mixing in the river and a dilution factor.

In argument crown counsel took the position that "oil and grease" is a deleterious substance and "per se" harmful to fish without regard to quantity or concentration of the substance, and that Section 33 (11)(a) should be the preferred section. In support of this they cited Section 4 of the "*Petroleum Refinery Liquid Effluent Regulations*", specifying as deleterious the various substances to be considered for the purpose of paragraph (c) in Section 33 (11), and further adopted the position that paragraph (c) could only refer back to Subsection (a). While I am sure that it does refer to Subsection (a) there is nothing to suggest that it should be limited only Subsection (a) and it appears to me that it could equally well apply to the "substances" referred to in Subsection (b).

The defence position was that reference to 33 (11)(a) would be made when there is an accidental or an intentional spill of what may be referred to as a more or less "pure" or somewhat homogeneous substance, and that Section 33 (11)(b) is a different type of deposit, which would be that of a process water licensed to be released either by accident or intentionally into a water which might contain fish.

Having considered all these matters, it is my view that Section 33 (11)(a) may well apply to the type of spill suggested by defence counsel, and obviously then Section 33 (11)(b) must have some other meaning and should apply to another type of situation. The facts of this case seemingly fit into a literal interpretation of Section 33 (11)(b) and I am of the opinion that these matters should be considered with respect to that particular section, namely Section 33 (11)(b). Moreover, the argument made by the crown in attempting to keep the matters within 33 (11)(a) relies on an interpretation of the "*Petroleum Refinery Liquid Effluent Regulations*" which do not apply to Suncor.

Having determined that Section 33 (11)(b) is the choice for consideration in determining the case at bar, I further take the position that in considering that section as a whole, the reasonable meaning of the word "any other water" would mean the "receiving water".

CONSIDERATION OF DILUTION AND "MIXING ZONE"

The defence argues that taking into account that any other water in 33 (11)(b) means the "receiving water", this of necessity requires that one look to a downriver dilution of a substance in the river and not at the interface of the deposit, that being the end of the pipe.

The crown's position, however, is that even if "receiving water" is referred to in the definition of "any other water" and given that it refers to the Athabasca River, it does not mean that one is concerned with the effects of a substance diluted and downstream in the river.

I accept the position that Section 33 (11)(b) only speaks of quantity and concentration. Nowhere does it refer to time or distance downriver and I am of the opinion that if that had been contemplated, it would have been specified in the subsection. In addition, the tense used and the words "is rendered" lend credence to the argument that time or distance parameters leading to any conclusion that one should look at the substance deposited in water after dilution by the river and sent downstream, were never contemplated.

In a case referred to me dealing with the deposit of a substance in a river, namely *The King v. The Chairman and Justices of Antrim* (1906) 2 I.R. 298 Lord Chief Baron Palles in considering the statute therein said at page 329:

> "In my opinion, the time at which the deleterious character of the matter is to be ascertained is the moment it enters the river. The effect of the action upon it of the water of the river, which necessarily must be after it has entered it, is in my view absolutely immaterial."

Certainly this was not a case under our particular statute, but it would appear that the ultimate aim was similar, that is, maximum protection being afforded to fish or fisheries from any deleterious substance placed in the river. Surely a similar approach must be taken to provide for quick and easy proof in order to fulfill the purposes of the act so that the crown need not model the river and perform endless and costly tasks as to calculation of concentrations at various downstream locations or be required to consider the identity and metabolism rate of various types of fish which may or may not avoid the toxic material, or may or may not at any given time swim upstream out of the effluent or downstream, where they may further contact the effluent.

In the result, I am of the view that a consideration of a deleterious substance must primarily be made at the end of the pipe where the effluent enters the river, and that any consideration of a "mixing zone" or area of allowable pollution around the end of the pipe would be totally without merit unless it was specifically allowed by the Act or regulation.

WHAT IS THE CROWN REQUIRED TO PROVE

Having determined that the proper approach would be that the effluent from Suncor would fall under the definition of "deleterious substance" set out in Section 33 (11)(b) and that "any other water" should refer to the "receiving water", the next consideration would appear to be a determination as to what the crown might be required to prove to secure a conviction in the case of a deposit of a deleterious substance, as defined by Section 33 (11)(b). In considering this, counsel referred me to a number of cases and more particularly, to that of *Regina v. Great Canadian Oil Sands Limited* (an unreported decision of the District Court of Alberta in 1978 by McClung, DCJ (as he then was); *Regina v. MacMillan Bloedel (Alberni) Limited* 1979 WWR 54 a Judgment of the *British Columbia Court of Appeal*, and *Regina v. Cyanamide Canada Incorporated*, 1981 11 CEL RS1, a Judgment of the Ontario Provincial Court.

In the first case referred to namely, *Reginal v. Great Canadian Oil Sands Limited* the Court held that evidence was required that the deleterious substance affected the receiving waters. This case although decided in 1978 involved acts which originated at a time prior to the 1978 amendment to "*The Fisheries Act*" so that there was no consideration of the words "or is likely to be rendered" as they presently appear in the definition of "deleterious substance". Moreover in its factual context the case did not involve the effluent from the plant but was rather concerned with drainage from the tailings pond. Although Great Canadian Oil Sands was the predecessor in title to the plant which is the subject matter of these proceedings, the deposit alleged in that case was not the same as that alleged in the present case. In the *Great Canadian Oil Sands* case it is also to be noted that McClung D.C.J., (now a member of our Court of Appeal) found no proof that the waters of the Athabasca River were frequented by fish which is indisputably a necessary element for a conviction on this charge.

In *Regina v. MacMillan Bloedel (Alberni) Limited (supra)* the British Columbia Court of Appeal was considering a case involving the spillage of Bunker C oil at a deep sea dock at Alberni Inlet. The Court refused to accept a narrow definition of the phrase "water frequented by fish" and indeed that subject is not in serious dispute in the present case as there has been substantial evidence of fish in the Athabasca River. In *MacMillan Bloedel* the Court made its finding on the definition of "deleterious substance" under Section 33 (11)(a) and at page 658, Seaton, J.A. in given the judgment of the court said:

> "Once it is determined that Bunker C oil is a deleterious substance and that it has been deposited the offence is complete without ascertaining whether the water itself was thereby rendered deleterious. I do not think that the words "that water" in the definition section mean the water into which it is alleged the Accused deposited the substance. These words refer back to "any water", at the beginning of the definition: the hypothetical water which would degrade if the oil was added to it" ---
>
> He continued thereon,
>
> "Had it been the intention of Parliament to prohibit the deposit of a substance in water so as to render that water deleterious to fish that would have been easy to express. A different prohibition was decided upon. It is more straight. It seeks to exclude each part of the process of degradation. The thrust of the section is to prohibit certain things, called "deleterious substances", being put in the water. That is the plain meaning of the words used and is the meaning that I feel bound to apply."

Although the *MacMillan Bloedel* case was subsequent to the *Great Canadian Oil Sands* case the latter was not cited to the British Columbia Court of Appeal. Leave to appeal the decision of the British Columbia Court of Appeal was sought from the Supreme Court of Canada, but leave was refused.

In the case of *Regina v. Cyanamid Canada Inc. (supra)* a Judge of the Provincial Court considered a case of effluent being discharged into the Welland River. These discharges were within a Control Order issued under the *Environmental Protection Act* 1971 S.O., c. 86 as amended (now R.S.O. 1980, c. 141, as amended). Wallace P.C.J. accepted the *MacMillan Bloedel* decision and held that the refusal of leave to appeal by the Supreme Court of Canada impliedly overruled the *Great Canadian Oil Sands Limited* decision. He found the Defendant guilty upon proof of deposit of a substance deleterious to fish into water frequented by fish. Nevertheless the form of deposit was ascribed to subsection (11)(a) rather than (11)(b) although the point does not appear to have been argued.

It therefore seems apparent that if a deleterious substance is deposited and if the water is proved to be frequented by fish then this is all the crown need to prove, and this holds true irrespective as to whether the deleterious substance is the substance itself as referred to under Subsection (a) of s. 33 (11) or whether it is an effluent under Subsection (b) or for that matter a treated water under Subsection (b). The test is the deleteriousness of the substance or solution or the water and if such a substance should be found to have been deposited in water frequented by fish then a conviction should follow.

THE CONSTITUTIONAL ARGUMENT

If the position of the defence is that I should determine whether or not Section 33(2) of the "*Fisheries Act*" is proper Federal Legislation, I would refer counsel to *Northwest Falling Contractors Ltd v. The Queen* (1980) 53 C.C.C. 2ne ed. 353 which upheld the constitutional validity of that section, namely, Section 33 (2) of "*The Fisheries Act*". In considering that case Martin J. in giving the judgment of the Supreme Court of Canada said at page 360:

> "The definition of deleterious substance ensures that the scope of Section 33 (2) is restricted to prohibition of deposits that threaten fish, fish habitat or the use of fish by man."

Accepting this approach as the test in determining the area encompassed by proper Federal Legislation, I have no doubt that Section 33 (2) is "intra vires" of the Parliament of Canada, although Section 33 (3) which is not directed at the matter of "deleterious substance" was held to be "ultra vires" in the case of *Fowler v. The Queen* 1980 5 W.W.R. 512 S.C.C.

Other constitutional arguments do not appear to be in issue herein, as I am now considering violations of the Federal "*Fisheries Act*" and not offences under the Alberta "*Clean Water Act*". It is my understanding however, that the question of "vires" was considered by Judge Horrocks in a previous case and he held that the "*Clean Water Act*" was intra vires, the legislature of the Province of Alberta, and although the matter is not here in issue, I agree with that position. The intention of the "*Fisheries Act*" is well known, being the protection of fisheries and fish, whereas that of the "Clean Water Act" is for maintenance of water quality. It is moreover apparent that if Judge Horrocks was in error in holding that the "*Clean Water Act*" was "intra vires", then the "*Fisheries Act*" in any event is "paramount legislation", and would have total applicability herein.

WATER FREQUENTED BY FISH

Section 33(2) of the "*Fisheries Act*" speaks of "water frequented by fish" as meaning "Canadian Fisheries Waters" and in the interpretation section of the *Fisheries Act*, namely Section 2 "Canadian Fisheries Water" and "fish" are defined as follows:

> "Canadian Fisheries Water" means all water in the fishing zones of Canada, all waters in the territorial sea of Canada, and all internal waters of Canada.
>
> "Fish", includes shellfish, crustaceans, marine animals and egg spawns, spat and juvenile stages of fish, shellfish, crustaceans and marine animals.

I am totally satisfied by all the evidence I have heard, including the evidence of Dr. McCart, a defence witness, that the Athabasca River is water frequented by fish, and that at least 20 different varieties of fish may be found in this particular river. It may well be that immediately at the source of the outfall pipe due to the force and pressure with which the effluent reaches the river, that no fish would continue to reside in the immediate locale for any length of time, but certainly within some little distance from that pipe resident populations of fish do in fact reside during the winter months, and can be found in holes, or behind rocks where the outflow velocity had diminished. Certainly Mr. Spagnut had no difficulty in finding fish, although the particular fish that he spoke of were apparently found near the bottom of the "hot-spot" which was some little distance from the outfall pipe.

I am, however, of the view that the test for "water frequented by fish" may not even be factual, but is that test applied in the case of *Reginal* v. *MacMillan Bloedel (Alberni) Limited* 7 B.C.L.R. 210 where McClellan, County Court Judge reversed the trial Judge and said at page 211:

> "The learned trial judge devoted some time to considering the expression "water frequented by fish" and came to the conclusion with respect to the word frequented, that parliament had intended that to mean that "there had to be an element of habitual association of fish with that water". I would concur with that interpretation of the word "frequented". But I do not conclude that the meaning can be extended to mean that the water must be occupied by the fish continually or even very frequently. If it is apparent that the fish use the water regularly - even if only annually for a short period - then such water would in my opinion qualify as "water frequented by fish".

The judgment of the learned County Court Judge was sustained by the Appellate Court (*R.* v. *MacMillan Bloedel (Alberni) Ltd. 12 B.C.L.R. 29*).

> In considering the findings of the original trial Judge:
>
> (a)
> that the water of the estuary of the Somass River in the Alberni Inlet in which the deep-sea dock is located is water frequented by fish;

(b)
that the particular water beneath the deep-sea dock was not frequented by fish;

(c)
that the oil spill was contained in the water beneath the deep-sea dock and did not endanger the fish frequenting other parts of Alberni Inlet.

Seaton, J.A. in giving the judgment of the Court at page 32 said:

> "I think that approach too narrow. It restricts the inquiry to commercial fish present at the moment of the spill in the very drop of water into which the oil was spilled. I am not prepared to accept any of those restrictions. The definition of "fish" is given in the act and it is broad. The section does not speak of "water in which there are "fish" but of "water frequented by fish". To restrict the word "water to the few cubic feet into which the oil was poured, would be to disregard the fact that both water and fish move. I think that the learned County Court Judge did not err in law when he concluded that this deposit took place in water frequented by fish."

Although the MacMillan Bloedel case was a consideration of matters under Section 33 (11)(a) of the "Fisheries Act" ie: an oil spill per se, I am of the view that a similar interpretation should be given to the same phrase in Section 33 (11)(b) and I conclude that the Athabasca River including the water where the outfall pipe from the wastewater system reaches the river is "water frequented by fish".

WHAT IS OIL AND GREASE?

"Oil and grease" is not defined by legislation. Looking at Webster's Third International Dictionary, the two words are defined individually as:

Oil:

1	a:	any of various substances that typically are unctuous, viscous, combustible liquids or solids easily liquefiable on warming and are not miscible with water but are soluble in ether, naptha, and often alcohol and other organic solvents, that leave a greasy not necessarily animal, vegetable, mineral or synthetic origin, and that are used according to their types chiefly as lubricants, fuels and illuminants, as food, in soap and candles and in perfumes and flavouring materials--compare essential oil, fat, fatty oil, mineral oil
	b:	petroleum
2		a substance of an oily consistency: as a: a comestic preparation containing oil (bath) (hair) (sunburn) b: nitroglycerin

Grease:

1	a:	rendered animal fat esp. when softer than tallow, inedible, and obtained from waste products

b: fatty tissue: fatness (put some--on those thin bones of yours--S.H. Adams)

c: oil matter or a thick oily or buttery preparation esp. when not fine or pure

d: a thick lubricant (as a petroleum oil thickened with a metallic soap) (axle) (silicone)

It will become apparent that in looking at this definition that particularization is somewhat difficult, to say the least. The evidence of the experts showed that "oil and grease", particularly in a semi-refined condition is composed of a bewildering variety of organic compounds which range from what are called the lighter ends "made up of molecules with relatively few carbon atoms" to the heavy ends being "very complex molecules containing large numbers of carbon atoms". The relative volatility of these molecules declines with their complexity, that is, the simpler, light ends will be volatized at a lower temperature whereas the more complex, heavier ends require a higher temperature to volatize. This property is used in the gas chromatograph which is a measuring tool in which a quantity of the subject matter is subjected to increasing temperatures and the amounts of material and the temperatures with which they come off the samples are measured. This machine makes a graphic tracing which is referred to as a chromatogram and each chromatogram gives a picture of mixtures or oil and grease contained in the samples, which show as peaks on a linear tracing. The height of the peaks chemically gives the amounts of substance or substances that are volatized at a given temperature.

In view of the complexity of the definition, I was then obliged to consider the expert's definition of "oil and grease" which is that collection of substances which are extracted by any of a number of solvents, using specific test procedures. Dr. MacKay at p. 2816 defined "oil and grease" as follows:

> "A. . . . phase that a hydrophobic (water hating) substance could migrate (to) in a solvent such as pentane or freon or petroleum ether. So that if you take a sample of this water and you contact it with another hydrophobic liquid such as petroleum ether or freon, the water will expel all hydrophobic material into the solvent, and you can then take that solvent away, dry it, evaporate it, and what you have left is what is colloquially termed oil and grease. So, the oil and grease test is essentially one in which you are measuring the amount of hydrophobic material in the water, and it's exactly analogous to putting fish in water, except instead of using fish you use a volume of another liquid. So that term oil and grease, I think, really should more correctly be termed hydrophobic organic material."

Dr. Kratochvil defined it thusly:

> "Oil and grease has a definition in terms of testing in that it is defined as the material that is extracted from waste and measured by a specific procedure such as an ASTM procedure. In terms of scientific definition the general class oil and grease covers so many different materials in such a different variety of chemical structures that I wouldn't really call it a scientific definition as such."
> (p. 4524, lines 5-18)

He further agreed with the definition of oil and grease stated in Standard Methods for Examination of Water and Wastewater, 14th ed. (Exhibit 13) which said:

> "Grease and oil may therefore be said to include hydrocarbons, fatty acids, soaps, fats, waxes, oils and any other material that is extracted by the solvent from an acidified sample and that is not volatized during the manipulation of the test--greases and oils are defined by the method used for their determination."

I would therefore appear that in view of the difficulty in particularizing the content of "oil and grease", that the definition attributed to it by most of the experts should be accepted. Certainly, the further position the experts also adopted and which I accept is that natural tar sand chemically differs from material produced after coking and cracking at the Suncor plant, and that certain types of components which are insignificant in natural bitumen are increased most appreciably by the cracking process. Accordingly, as was stated by Dr. Montgomery, Dr. MacKay and Dr. Vandermeulen, whose evidence I have accepted, the proportions of benzenes and alkylated benzenes are greatly increased once cracking takes place. It is further noted that in the opinion of Dr. Montgomery, Birkholz and Kimble and other experts, sample 1302 has been through the cracking process and that sample contains a whole series of aklylated benzenes as well as benzothiophenes.

CHARACTERISTICS OF SAMPLES 1302

This particular sample played a large part in the technical evidence at this trial and was a sample taken from the outflow area of the wastewater pond on the 17th of February 1982 by Mr. Wendland, a Fish and Wildlife Officer. There is little doubt that the presence of this material resulted from the plant upset the previous month, namely, the unfortunate events of January 21st and 22nd which clearly were the only unusual sources of additional contaminants going into the wastewater system and then to the river. A large number of tests were performed by qualified experts in order to characterize this sample and these include among others, "oil and grease" tests at the Alberta Environmental Center, and the Freshwater Institute in Winnipeg, simulated distillations, infrared spectroscopy, gas chromatography and gas chromatography/mass spectrometry as well as other particular tests such as Billeck/Murray/Lockhart test, the taste test by Roberta York's panel and the Hrudey/Gerard oil droplet experiment.

It is notable that Diane Spaciuk used the partition gravimetric method to determine the oil and grease content of 1302. In conducting her tests quality control samples were run and in using a known oil and grease sample, she ascertained that extraction was only 89 to 91% of the theoretical value of oil and grease content. The evidence of the experts also confirmed that there is no scientific method that will extract and measure all of the oil and grease in a particular sample. A further analysis of sample 1302 at the Alberta Environmental Laboratory disclosed that it was 95.6% oil and grease and this, of course, could contain other material such as chlorophyll, waxes etc. in addition to further unextracted oil and grease. Dr. Montgomery advised that the amount of that material other than oil and grease would be extremely small and chlorophyll would not contribute to toxicity. A further test of sample 1302, showing it to contain 97.5% oil and grease, was completed at the Fresh Water Institute in Winnipeg by Mr. Billeck, and Dr. Lockhart stated that toxicity of the sample was due to "oil and grease" saying that he was:

> ". . . quite convinced that the toxicity associated with this 1302 sample is associated with that 97 and a half percent measurable oil and grease because I

> know that there are losses. You can't measure a loss like that using an oil and grease test.
>
> (p. 1628)

Therefore it would appear that in the result 1302 was substantially or almost totally "oil and grease". Dr. Montgomery, in looking at a chromatogram of the sample, advised that there were larger molecules in the sample that were typical of a cracked product from bitumen, and were inconsistent with natural bitumen. Therefore it appeared that sample 1302 had gone through the coking and cracking process. It was also to be noted that alkylated benzenes would be produced as a result of cracking as would polynuclear aromatic hydrocarbons, the original quantities of these compounds being miniscule in natural bitumen, but would be greatly increased as a result of cracking. Dr. Kimble and others confirmed the presence of these products and there appears to be little doubt that sample 1302 consisted of components of oil and grease obtained from the cracking of bitumen.

1302 INTO THE ATHABASCA RIVER

There is no dispute that a pathway does exist from the wastewater pond to the Athabasca River and under its licence Suncor was obliged to monitor the flow of that effluent. This is the normal manner in which process water finds its way to the Athabasca. The defence took the position that "oil and grease" could not have gone beyond the wastewater pond because of the fact that Suncor had adequate equipment and filter arrangements with which to remove surface oil, as well as an uncommon piping arrangement whereby the ends of the pipes allowing flow between the wastewater pond and the duck pond, were located some distance below the surface of the pond and it was the defence contention that there would be no way in which surface oil could get into the river. Then one might ask, how did "oil and grease" get into the river? Obviously it did, because of the fact that many analyses including those of Suncor show that there were substantial amounts of "oil and grease" in the samples of the effluent that went into the river. Moreover, traces of oil and grease in the form of sheens could at times be seen on the surface both of the duck pond and the river. No other reasonable alternative has been suggested as being the source of oil and grease other than the Suncor plant, and in my opinion on hearing the evidence I have concluded that the bulk of oil and grease reached the river as oil in solution or in emulsified form as was explained by a number of witnesses, and more particularly, Dr. Donald MacKay, who was qualified to give expert opinion on the fate and behaviour of organic substances in the environment and who said in describing "emulsification":

> "When oil is spilled in water two emulsification processes occur. Small droplets of oil become separated from the main slick and get conveyed into the water and this is formation of oil and water emulsion. It is also know as dispersion.
>
> The reverse process also occurs when small droplets of water get inserted into the oil, and this is the formation of water in oil emulsion, colloquially known as chocolate mousse, and both of these are emulsification process and both of them I have studied."
>
> (p. 2795, lines 1-9)

And later in describing dissolved oil as well as emulsified oil, he said:

> "That process which I just described was dissolution in which the molecules of oil dissolve in the water. That is not the only mechanism by which oil can enter water. If you have oil on top of the water and, under most conditions you will form little droplets of oil in the water column, and that process of oil droplet formation is known as dispersion or emulsification; formation of oil in water; emulsion."
>
> (p. 2822)

Further in explaining the process, he said:

> "If you have any degree of agitation at all, stirring or wind action or waves or any contaminating materials such as clays, micro-organisms, dirt in the water, or oil, or especially if you have any surface active materials, detergents, then they greatly facilitate the process of formation of these oil droplets within the water, and these oil droplets vary in size from a fraction of a millimeter to about a millimeter, and they will, in most cases, drift around in the water and go with the water. The bigger ones will float back to the surface and form a little slick, but most of them will remain with the water and they are exceedingly difficult to separate from the water. Indeed one of the principle headaches of a petroleum refinery is to get rid of this emulsified oil from its water effluent."
>
> (p. 2823, lines 3-17)

It is rather significant that although all of the experts agreed on the fact that emulsification of oil could take place (some more than others spoke of the ease with which it could happen), that the entire process of emulsification received little in the way of consideration by the two representatives of Suncor, namely, Mr. Martin, who was the water environment manager and Mr. Johnson, the plant manager, who appeared to have little to do with wastewater matters, and whose major concern was saving the plant from further disaster. Dr. MacKay stated that emulsification could take place in quiescent waters and also suggested many further factors other than the presence of oil and dirt in the wastewater effluent, that might contribute to emulsification such as variance of temperature between the effluent itself, which was at a higher temperature, reaching the river, which was at a low temperature, the huge fire which would have caused many, mini explosions and extremely high wind velocities which would have resulted in substantial quantities of oil being conveyed into the water, in the form of emulsified oil. Further reference was made to the normal wind conditions which were available to the effluent in the wastewater pond and Mr. Ferguson of Supervisory Consultants who was hired for clean up operation as well as other witnesses made reference to the local winds and this was a factor considered in determining the location where booms were set up to corral surface oil. Another factor mentioned was the continuous running of the process water into the wastewater system and out into the river which would create a current and thus aid in the formation of oil droplets. I was totally satisfied that emulsified oil creates a very definite problem with respect to the effluent of petroleum refineries in general, and particularly, in my opinion it was a problem with the Suncor refinery.

In then considering what part of the effluent was available to the fish, I was required to consider not only oil in solution, which is commonly referred to as the water soluble fraction, but also and of greater importance, oil that is contained in the water column in the form of microdroplets which may thereafter emulsify. Much time and effort was spent throughout the course of the trial by various experts in discussing the difference between a true water soluble fraction which is the amount of oil that is taken up in solution in the same way as sugar would dissolve in a cup of coffee, as opposed to a true water accommodated fraction which includes not only the amount of oil in solution but in addition thereto, a larger quantity of oil in small droplet form also found in the water column. The basic concern in appreciating the difference between the two types of fractions, is that the water accommodated fraction contains a great deal more of "oil and grease", and moreover, it is that particular fraction and not surface oil which is generally available to the fish.

The experiment by Hrudey/Gerard was a very simple one which in essence showed the ease with which 1302, (this being the sample of material from the wastewater pond) would emulsify. Further one must appreciate that with respect to the many high readings for oil and grease both in February and March 1982, as contained in the Suncor reports, and with the continued contention by the defence that there was no way in which surface oil could reach the river (although one would have to be singularly naive to believe that some amount of surface oil did not escape into the river), nevertheless the only reasonable conclusion that I could draw from the evidence is that the bulk of "oil and grease" in the Suncor effluent consisted of dissolved oil and oil in small micro-droplet form (ie. emulsified oil) that was present in the effluent contained in the wastewater pond which subsequently proceeded through the entrapment devices and reached the Athabasca River. The evidence satisfied me that there must be recognition of the principle of emulsification in order to sustain those high levels of oil and grease over a significant period of time as set out in the reports provided by Suncor to the Environment Authorities, bearing in mind the particular factual situation herein as to the entrapment devices and also to account for the lethality to fish of the Suncor effluent as shown by the bioassays.

DR. GREEN (BACKGROUND LEVELS AND OTHER TEST)

It was obvious from the evidence given that much of the material produced by Dr. Green was based on information that he had obtained from an Inland Waters Directorate Publication. He then prepared tables showing background concentrations as they related to "oil and grease" readings deposited in the Athabasca River, but it was apparent from his evidence that much of the material was based on readings taken below detection limits and consequently was of little value, and in the result he said:

> "It appears that the background level of oil and grease in the Athabasca River to some extent is unknown because the method is not sensitive enough to see the value a reasonable proportion of the time."
>
> (p. 487 l)

Therefore, it is my opinion that little or no weight should be given to exhibits 154, 155, 156 and 157 and the evidence of Dr. Green relating to the background level of "oil and grease".

In considering the Baffin Island and other tests, he appears to be getting into the area of attempting to compare apples and oranges. It is to be noted that in referring to the Baffin Island test I asked why the experiment had not been carried on for more than 36 hours and received these replies:

> A. "The premise that this experiment was based on was different from the situation you are faced with in the wastewater pond —"

THE COURT: "I see, yes."

> A. "-- over a long period of time. They were dealing with an oil spill coming into a bay --"

THE COURT: "Yes."

> A. "-- and they felt that after a day or so either the oil would move on or else it would have been dealt with in some way but it wouldn't sit in the bay day after day after day."
>
> (p. 4767, lines 8 - 16)

Further, the oil used in the above test was mechanically stripped oil equivalent to 7% weathered oil and each night over the 36 hour period the spill was being cleaned up. In the result I am unable to accept that the conclusions reached by Dr. Green have much application to this particular set of facts involving effluent situated in a wastewater pond for some period of time. Further I have trouble concluding that the breakdown of oil or its removal from the system by way of biodegradation, sedimentation, or evaporation will occur as quickly as suggested by Dr. Green. More particularly, in his discussion of biodegradation, he admitted that he had not kept up with all the literature (p. 4934), and much of his evidence is at odds with Dr. MacKay and others, who suggest a much slower and less effective degradation process, or loss of oil from the river. In the result, I am in accord with Dr. Green's own assessment where he says in referring to Dr. MacKay:

> Q. "And you know him to be a person with a substantial amount of experience in the fate and behaviour of oil in the environment?"
>
> A. "I sure do, and if there is any way that I conflict with his opinion, I would say he is probably right."
>
> (p. 4090, lines 9 - 13)

PARTITIONING AND THE EFFECT OF TOXIC CONTAMINANTS ON FISH

In considering whether or not "oil and grease" is a deleterious substance I was first obliged to particularly consider its effect on fish, and this required some appreciation of a number of scientific facts relative to fish biology, which were laid before me by the evidence of many experts and I will hereafter refer to some of this evidence which I accepted as fact.

WATER OCTANOL PARTITION COEFFICIENT

Dr. MacKay was the particular expert who was able to provide information on this, and certainly many of the other experts touched on these matters throughout the trial. There was no dispute as to the underlying scientific principal and I merely refer to it with a view to providing a background in considering the topic of bioconcentration. No contrary evidence was given on this point, and I accepted Dr. MacKay's evidence totally. In its argument the crown referred to various parts of Dr. MacKay's evidence which appeared to be accurate and consequently, for the sake of convenience I will merely repeat what was stated in crown argument at page 65 and 66.

> "At the start of his evidence Dr. MacKay gave an explanation of how oils behave when they are still in water and when they partition into various parts

> of the environment. He commenced his explanation by explaining some of the underlying principles, chemical compounds that were hydrophobic, which class of compounds contained oil and greases. He stated, using as an example alcohol, that if little drops of alcohol were put into water, the water would dissolve them, and regardless of the amount of alcohol added, the water would have the ability to dissolve all of it. He described water and alcohol as being "mutually compatible, and a substance like that is know as hydrophilic, that is, water loving"."
>
> (p. 218, L. 1-9)
>
> "He stated that if the experiment was done using benzene, the behavior was different. If a very small drop of about one milligram was put into the water drop by drop, one could only put in 1780 drops and then the water would not accept any more benzene, and any drops beyond that figure as above quoted would float on the surface. He indicated that such a substance was "hydrophobic", or "water hating". He indicated that if the experiment was again done, this time using toluene (methyl benzene), a somewhat bigger molecule, then one could only put in 540 drops prior to rejection. Continuing on with his examples, he said that another hydrocarbon, tetramethyl benzene (C_4 benzenes), would only accept about 30 drops, and phenanthrene could only be put in, to the extent of 1.2 drops, while in benzopyrene, only a very small fraction of a drop could be dissolved."
>
> (evidence of Dr. McKay, p. 2810, L. 12 & 13)

He then set out the four phases available to hydrocarbons when they were rejected by water. These he listed as:

> "1. Sediment;
>
> 2. Air (for a hydrocarbon to partition into this phase, he stated that the bigger the molecule, the greater the difficulty to partition into air);
>
> 3. Fish Hydrocarbons would partition into fish, as both hydrocarbons and fish were hydrophobic;
>
> 4. A solvent, such as used in an oil and grease test. ". . it's exactly analogous to putting a fish in water"."
>
> (Dr. McKay, p. 2813 - 2815)
>
> "The analysis of octanol/water partition coefficient provides the background for an analysis with respect to bioconcentration."
>
> (2810 - 2815)

BIOCONCENTRATION

In then considering the effect of a deleterious substance on fish, the experts had me consider the meaning of bioconcentration.

Dr. Malins testified as follows:

> "a number of experiments have confirmed the fact that in the laboratory at least the hydrocarbons tend to be amplified in the organs of fish, particularly

> the liver. And we have conducted experiments with salmonids, trout and salmon, these sorts of animals, which suggest that the amplification with the water soluble components can be in the order of perhaps as high as 10,000. In other words, the concentration in the liver is 10,000 times that which the animal is exposed. A good example of which you get such high magnification is with the highly alkylated benzenes which are present in the water column.
>
> (p. 2946, L. 18 - 27)

In considering the effect of highly alkylated benzenes he was asked these questions and gave these replies:

Q. "Those are the ones that would demonstrate this amplification to a great degree?"

A. "That is correct."

Q. "Now, when there is this --- this kind of uptake, and the uptake small amount possibly amplified, what are the tissues or the organs that these substances would tend to go to?

A. "Well, compounds such as naphthalene, if we return to that as the example, will accumulate to a considerable extent in the brain, as well as the liver, but they also find their way to some degree, and I think I've indicated before, to other areas such as the edible muscle, the kidney and places such as that, including of course in the blood."

(p. 2947, L. 3 - 14)

Dr. John Vandermuelen on being asked the meaning of bioconcentration, said at page 3579, L. 24:

> "It simply means the uptake from the environment. In this case, the aquatic environment in such a way that the result in concentration in the tissues becomes greater than that in the environment around it. This is a very normal phenomenon. I don't know of it not happening in any organism where the interior concentration of the hydrocarbons that is in the tissues, becomes greater than that is found in the environment. In the environment, one might begin with one part per million hydrocarbons and after some time of exposure this one part per million hydrocarbon the organism when analyzed will be found to have higher concentrations."

And at page 3580, L. 15 - 18, in reply to a question dealing with an increase in concentration, Dr. Vandermuelen said:

A. "An order of magnitude of 3, 5 or 10. Yes that means it could be a hundred times or a thousand times even. These concentrations effects are very, very quick, and they occur, to my knowledge, in almost all instances.

Having learned the meaning of bioconcentration, it then became necessary that I should consider the bioconcentration factor which is used to calculate what the bioconcentration is in a fish. Dr. McKay explained it thusly: (p. 2819, L. 1 - 14)

> "That the bioconcentration factor, that is a ratio of a concentration of fish to concentration in water is about .048 or about one-twentieth of k. so that if you have a k of 20,000, you can expect a bioconcentration factor of about 1,000. This provides a mechanism of calculating what the concentration will be in a fish of any particular substance present at a known concentration in water, and these numbers can become very large, up in the millions, which is why fish occasionally become tainted with very minute quantities of material from water; they bioconcentrate into the fish."

Thereafter in explaining how the bioconcentration factor behaved, he said at page 2820, L. 26:

> "For example, with a substance like benzene if the concentration in the water is 1 . . . we get a concentration of about 6 in the fish. Napthalene . . . you get a lot more in the fish concentration in the fish would be 110 times that in the water . . . benzo-pyrene, . . . you get an enormous concentration within the fish, maybe 150,000."

The purpose, of course, of all this evidence which I accepted, was to explain the significance of tables prepared by Dr. McKay to show the bioconcentration which would occur in a fish which has been exposed to specific compounds. (exhibit 65)

METABOLISM, UPTAKE & DEPURATION

Having considered the position of bioconcentration, it was then necessary to examine the process of metabolism whereby a fish attempts to deal with the foreign compound it has taken into its system. Dr. Malins was qualified as an expert in this field and was obviously a man of tremendous experience and ability, whose evidence I have accepted. He described metabolism thusly:

> "is what the organism does with a foreign compound to include transforming it into one or more other compounds usually with the perceived or apparent intent to detoxify that compound."
>
> (p. 2927)

> "We know from studies with mammals, as well as from studies with fish that the metabolism of xenobiotics, that is, foreign compounds, to include the components of petroleum, is intimately linked to toxic effect."
>
> (p. 2934)

> "Well, metabolism results in the formation of a number of other compounds and while it appears that the intent, if one may use that word, is to detoxify these compounds when in fact, they build up in tissues and high concentrations due to fairly high levels of exposure, it might be questionable as to whether this is in fact detoxification or whether in fact is is leading--is a potential source of damage for the organisms."
>
> (p. 3004)

Dr. Coutts, a defence witness in considering the nature of metabolites (other compounds resulting from the metabolic process) had this to say:

Q. "Do you have any knowledge with respect to naphthalene as to whether or not its intermediate products might be more toxic or could have toxic action, at that?"

A. "I--it wouldn't surprise me. I know that there are some naphthalene derivatives that are very toxic. Naphthalamine, for example, is very toxic."
(p. 5088, L. 15 - 20)

Basically there was no genuine dispute as to the metabolic process and its application to fish.

DEPURATION

The process by which a fish rids itself of hydrocarbons is called depuration and this depuration is predicated upon having the organism placed into clean water (as opposed to water that is consistently being injected with petroleum hydrocarbons). Dr. Malins had this to say relative to the matter:

> "Well, depuration means that if you take an animal which has been exposed to hydrocarbons and place it in clean water which is totally free from hydrocarbons that the animal will tend to lose from his tissues under these conditions the petroleum component."
> (p. 2950, L. 23 - 27)

He then testified that depuration was never total, saying:

> "I would merely say that with regard to the parent hydrocarbons that a small fraction of the total load seems to tend to persist for quite a long time as we deduce from laboratory studies. With respect to the metabolites, we have evidence to indicate that they can persist for quite long period of time, quite often after most of the hydrocarbons, in fact, has been discharged from the tissue."
> (p. 3005)

And at page 3024:

> "I would be inclined to believe that perhaps three months in clean water would lead to the presence of very few of most of the hydrocarbons which one is pinpointing in most routine chemical analyses."

Certainly in my own question Dr. Vandermuelen, he stated that when referring to the animal kingdom, fish are included.

It was my conclusion from all of the evidence that to depurate via the metabolic process, the fish must have an exposure to clean water and certainly Dr. Malin's evidence was that not only the original compounds but the metabolites formed (that is something other, and perhaps even more toxic or dangerous than the original compound) would persist for a long time. In the result, on being satisfied that depuration could not take place in water unless free from hydrocarbons, then in considering the continued amounts of oil and grease over and above the allowable limits that Suncor was placing in the river, during the time encompassing both of the charges and prior, I was of the view that the depuration process was likely to be slow.

LIKELY TO BE RENDERED DELETERIOUS

Section 33 (11)(b) of the Fisheries Act is hereinafter set out and I have underlined the specific words added by amendment in 1977 namely:

> "any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration or the quantity of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water."

In considering the meaning of the phrase "or is likely to be rendered", it appeared incumbent that I first consider the meaning of "is rendered deleterious" without reference to the amendment. Certainly both by dictionary meaning and in the opinion of experts the word "deleterious" includes lethal and sublethal effects which would result in damage to an aquatic organism and this may include matters such as growth, respiration, reproduction, larval survival or abnormal development. Obviously the added words "or is likely to be rendered" must connote something more and in my opinion this refers to "potential deleteriousness".

Without determining whether any cause and effect relationship was required to be shown by physical evidence of damage to fish when the sole consideration was "deleteriousness", as was the situation prior to the 1978 amendment, it is my opinion that in view of the fact that some sublethal effects even after a considerable exposure to a deleterious substance may not be apparent to the naked eye, then credible scientific conclusions reached by competent scientists engaged in conducting experiments on lethal and sublethal effects by way of numerous bioassays and LC50 tests that have been conducted with fish of various sizes and maturity and with variable concentrations of toxicants including "oil and grease" would be sufficient to satisfy the requirement of finding that a particular toxicant placed in water may degrade it to the degree that it is likely to be rendered deleterious to fish.

However, beyond this a great deal of evidence was adduced in this case relative to the congruency between the hydrocarbon profile found in sample 1302, and the fish caught in the Athabasca River, this being the evidence of Birkholz and Chittim and their analytical tests including gas chromatography and mass spectrometry, many of these findings have been corroborated by Dr. Kimble. Dr. Kimble was extremely impressed with the quality of the work and the equipment that was used in conducting these various tests by Birkholz and Chittim. She confirmed the presence of alkylated benzenes and benzothiphenes, and referred to many of the initital identifications in Chittim's evidence; and further advised of the presence of alkylated benzenes. It must be remembered that not only did Dr. Kimble complete a reassessment of the raw data of both Birkholz and Chittim but in addition thereto, she made her interpretations on the basis of first principles.

A defence argument was directed to the question of "standards" in the particular context of being a chemical benchmark against which each sample might be considered, and this related to the evidence of both Birkholz and Chittim. My position was that the chemical "standards" used by Chittim and Birkholz were satisfactory and I do not propose to labour the point as my views in this matter are expressed at some length in the transcript.

In then considering the professional standards of each of these witnesses in the more accepted sense, these were found to be high and that was confirmed by Dr. Kimble who obviously had been required to consider the quality of scientific equipment and personnel on a broad basis throughout the continent.

In the result, I was of the opinion that the material generated by Chittim and Birkholz as reviewed by Dr. Kimble was of high quality, and having considered all the evidence, I was satisfied that the fish in the Athabasca River were exposed to the same material as contained in the deposit of 1302 which was found on top of the Suncor wastewater pond.

Counsel were unable to suggest to me that the phrase "likely to be rendered deleterious" was the subject of any judicial comment but I was referred to *Regina* v. *Carleton* (1983) 69 C.C.C. (2 d) 1 (Alberta Court of Appeal)* in which the work "likelihood" was considered with respect to the burden of proof that would apply to Section 688 of the Criminal Code. I am satisfied that there is only a grammatical distinction between the two words, in the "likelihood" is a noun and "likely" is an adjective. At page 10 of the Carleton case, McDermid J.A. said:

> "The Chief Justice states that the Court must have no reasonable doubt as to such 'likelihood'. All dictionaries I have consulted give a synonymic definition of 'likelihood', 'probability'. To say that the court must have no reasonable doubt as to the likelihood or probability is exactly the same as to say that the court on a preponderance or a balance of probabilities must be satisfied. The dominant word is 'likelihood'. To prove beyond a reasonable doubt a probability still leads only a probability and to prove a probability on a balance of probabilities leaves only the same probability."

The judgment set out above appears to suggest that a test on the balance of probabilities was the required one, when the word "likelihood" was used, and defence counsel suggested that a similar test should be applied in the case herein. Although that position may have merit, nevertheless, the test that I propose to use herein is proof beyond a reasonable doubt that the quantity or concentration of "oil and grease" deposited in the river was of such a nature that it would degrade or alter the water so that it was likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent the water.

CHITTIM TESTS ON FISH TISSUE AND ADMISSIBILITY

Suncor argued that some of the gas chromatograms and the mass spectral data generated by Chittim in his fish analysis and upon which his opinions were based, were not formally entered in evidence, and accordingly his opinions should be of no weight. In support of this they quoted two cases from this jurisdiction namely, *Regina* v. *English* Appeal No. 14820 Alberta Court of Appeal (unreported) and *Regina* v. *Abbey* (1982) 68 C.C.C. 2nd ed. 394. It was suggested that in both cases, the opinion of an expert should not be accepted unless his opinion was based upon facts which were either proved by him or other witnesses in the trial. This, would of course, appear to be a reasonable position and any number of authorities support it. However, I have grave doubts whether the considerations that applied in those cases would have any application in the matter herein.

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* It is to be noted that *Regina* v. *Carleton* was appealed to the Supreme Court of Canada 6 C.C.C. (3d) 400 and in a unanimous judgment the court found that there was no error in the judgment of the majority of the Court of Appeal of Alberta.

> In the Abbey case (supra) at page 408 Dickson, J. Said:
>
> "the main concern of the hearsay rule is the veracity of the statements made. The principle justification for the exclusion of hearsay evidence is the abhorence of the common law to proof which is unsworn and has not been subjected to the trial by fire of cross examination. Testimony under oath, and cross examination, have been considered to be the best assurances of the truth of the statement of facts presented."
>
> and at page 411:
>
> "in the present case, Abbey did not testify. Dr. Vallance testified in the course of his opinion as to many events and experiences related to him during the several interviews. His testimony, while admissible in the context of opinion, was not in any way evidence of the factual places of these events and experiences. The trial Judge in his decision fell into the error of accepting his evidence of these facts testimony which if taken to be evidence of their existence would violate the hearsay rule."

There is no doubt that in the English and Abbey cases (supra) error was made as certain prerequisites were accepted as fact and were used by the expert in giving his opinion, whereas no one had ever proved these factual prerequisites, and consequently this eroded the base on which the opinion was given. That does not appear to be the situation in this case. The material involved herein was raw data generated by Chittim who was qualified as an expert in environmental analytical chemistry. He had endeavoured to show congruency between the hydrocarbon profile found in 1302 and fish samples from the Athabasca and he had prepared the necessary samples and made library searches. A particular concern in this trial related to the production of originals which would be more easily read, rather than a copy which is sometimes a less readable photocopy. As there were large amounts of material and particularly chromatograms I directed that the original documents be made available to the defence so that defence experts could peruse this material while preparing for the cross examination of Mr. Chittim. At that particular time Mr. Thomas, defence counsel sought to peruse originals rather than copies and said at page 3418, line 12:

> "That's the only reason we're asking for it, it's hard to look at."

I then directed that the originals would be provided to the defence and stated that some type of accommodation had better be worked out. No further complaint was voiced thereafter and I presumed that my direction was effective and the original material was made available to the defence experts. Throughout the trial scientific background material on which experts formulated their opinions was readily made available to opposing experts for their consideration, and as there appeared to be full disclosure of all material on which the opinions were based, I was of the view that this argument was without merit.

BACKGROUND OIL: UP STREAM, EFFLUENT AND DOWN STREAM

The crown in adducing the evidence of Mr. Strosher showed a dramatic difference between the background hydrocarbon profiles from samples taken up stream of Suncor as compared with the hydrocarbon profiles of Suncor's effluent, and those taken down stream of Suncor. These were gas chromatograms taken in 1977 from collected samples which were fractionated into both aliphatic and aromatic fractions for the purpose of analysis.

In the result, the chromatograms showed that in considering both aliphatic hydrocarbons and aromatic hydrocarbons that the effluent sample and the down stream sample were basically similar, and the up stream sample compared to the effluent sample was dissimilar.

Moreover, with respect to the relative abundance of both aliphatic hydrocarbons and aromatic hydrocarbons, the chromatograms showed:

With respect to Aliphatics

Comparisons

(a) up stream and down stream--a difference in relative abundance
(b) effluent and down stream--a similarity of abundance

With respect to Aromatics

Comparisons

(a) up stream and down stream--greater amount down stream than up stream
(b) up stream and effluent--much more in the effluent than up stream
(c) down stream and effluent--similarity

It therefore became apparent that there was considerable difference between background oil as it occurs naturally in the Athabasca River and the oil contained in the Suncor effluent, and similarly, the down stream sample, the latter two having similarity. Dr. Vandermuelen and others have stated that there was a large chemical difference between background oil found in the effluent. Dr. MacKay and Dr. Montgomery also mentioned the low solubility of bituminous sands, particularly in the winter, the slow diffusion rate of low molecular weight compounds, and made reference to the process of oxidation wereby a skin would form on the outside of the bituminous sand that fell into the river and impede its diffusion even more. It is also to be noted that Dr. MacKay in looking at the Strosher chromatograms concluded that even at that time (1977) much of the oil present in the wastewater effluent and down stream was in the form of oil droplets, that is, emulsified oil which would be in a water accommodated fraction and available to fish.

PRODUCT TYPE

In considering the evidence of Mr. Johnson, the Suncor Plant Manager, he indicated that as a result of the release from the unifiners to the flare system which followed the original cracking process occurring in the coking furnaces, and the failure of the safety valve, a full range of hydrocarbons were dissipated. This would include gas-oil, naptha and kerosene and no doubt some combination of products in a less refined state, for at the time of the purge these may not have been completely refined products. He also mentioned the various finished products produced by the refinery, such as diesel fuels, jet fuels, JP4 and certainly diesel fuel was shown in evidence as being very toxic.

Dr. Montgomery in his evidence commented on Mr. Wispinski's simulated distillation of 1302 and indicated that the boiling ranges of the materials therein were similar to those referred to by Mr. Johnson as being released by the unifiner purge, these being the aforementioned hydrocarbons such as the naptha fraction, the kerosene fraction and gas-oil. There also appeared to be a congruency between the hydrocarbon profiles of 1302 and the fish samples as shown by the Chittim evidence and it appeared that material available from the unifiner purge was similar to the material found in 1302 on the top of the wastewater pond which had accessibility to the Athabasca River.

LETHAL AND SUBLETHAL EFFECTS

Dr. Vandermuelen was qualified as an expert on the biological effects of oil in the aquatic environment. He is an employee of the Marine Ecology Laboratory of the Bedford Institute of Oceanography in Dartmouth, Nova Scotia. I observed him to be a man of great knowledge, intellect, and experience, which was obvious from hearing him give evidence in the witness box. It is noted, that he is one of a group of five members of a specially appointed steering committee commissioned by the National Academy of Sciences of the United States, to prepare an update to an earlier report of 1975, providing an overall assessment of the effects of petroleum in the Marine environment. The report has now been completed and was based on the common output of forty background papers by experts throughout the world which were discussed at an international conference and were meant to reflect the combined view of representatives of industry, the private sector, and government organizations. Dr. Vandermuelen was particularly responsible for the chapter on "Effects of Petroleum". These background papers resulted from experiments with fish that were conducted by many scientists conducting bioassays and LC50s were obtained with various concentrations of various toxic compounds including "oil and grease". It is the result of these papers and his own experience that provides the basis on which Dr. Vandermuelen gave his evidence. He gave considerable testimony dealing with the lethal and sublethal effects on fish, and specifically defined and made clear that there was a difference between a sublethal response by aquatic animals to toxic exposure, and a true sublethal effect. The units of measurement for toxic concentrations were expressed in parts per million, or parts per billion and in the result, and he was primarily dealing with ranges, he stated that sublethal effects would occur when a fish was exposed to an effluent containing an "oil and grease" concentration between 50 parts per billion and 1 part per million and thereafter lethal effects would begin to arise. This was based on the most current information that was available, and he made reference to matters which might cause variability within the particular ranges given, such as the age of the organism, the life cycle state, the amount of fat that it has, whether the particular aquatic animal has a mechanism to turn on or turn off depuration and the particular composition of the petroleum hydrocarbons.

In referring particularly to the nature of sublethal effects Dr. Vandermuelen observed that sublethal effects would affect matters such as growth, respiration, reproduction, egg hatching, larval survival, and he also referred to a situation of normal against abnormal development making reference to a syndrome known as broken back syndrome where the backbone of the fish becomes disjointed.

It is again to be noted that the numbers given for concentrations in these various ranges were not stated as absolutes, but merely showed the general ranges where the effects would be found.

I have accepted the evidence of Dr. Vandermuelen and I am of the opinion that he is an extremely balanced individual as can be grasped from the comment that he made in giving evidence at page 4157 where he said:

> "As an idealist and a humanist, I am repelled by the idea of releasing foreign material or toxic material into the environment, period. I--this is a personal credo, but I believe I would like to hand over the environment onto my offspring in the same way I inherited it. Unfortunately, I also like to be able to turn on the power switch and have light in my greenhouse. For that, I need energy. So I have to make a compromise. So, I admit to a level of release of effluent into the river."

In his evidence he stressed the fact that it was the water accommodated fraction which was the greatest concern to fish rather than the water soluble fraction alone which would be only the fraction where the oil was totally soluble in water. The water accommodated fraction would include both the water soluble fraction and also the small micro-droplets of oil which remain suspended in the water column. I am of the opinion that Dr. Vandermuelen's ranges for oil and grease toxicity would include all oils as a class be they Bunker C fuel oils, other crudes or Suncor oil and grease. Obviously, these matters were considered within the context of broad guidelines as it is obvious that some oils are more toxic than others. Comment was also made relevant to the toxicity of alkylated benzene compounds and polynuclear aromatic hydrocarbons and in commenting about the alkyl-substituted thiophenes, benzothiophenes and dibensothiophenes, Dr. Vandermuelen said:

> "If I found dibenzothiphenes or that class of compounds in a tissue or in a water sample, that would lead me to suspect that it had been contaminated by a petroleum hydrocarbon at some point."
>
> (p. 4124, L. 16 - 19)

Notably the above were compounds found by the analysis of many experts, including Birkholz and Dr. Kimble, in sample 1302 as well as in Mr. Chittim's fish samples.

DR. SPRAGUE, THE TRAFALGAR REFINERY AND UNIT TOXICITY TABLES

Dr. Sprague agreed with Dr. Vandermuelen's toxic figures for crude oil, and similar products but appeared to take the position that these figures were inappropriate when considering the toxic effect of oil and grease in a refinery wastewater effluent, and moreover he observed that other compounds in the effluent might be the source of the toxicity. In support of these contentions he referred to his Crude Oil Refinery Report and particularly the results obtained from the BP Trafalgar Refinery in Ontario, which he said would validate his position (exhibit 179). He then suggested that a refinery effluent that might contain a very substantial quantity of "oil and grease" was not very toxic. That broad statement must, however, be looked at while considering the following comment at page 5392 where Dr. Sprague said:

> "- - if you look at toxicity to fish, the Ontario effluent, although it was initially thought to be a good one, I will point out that it was far from being

harmless; 23 percent -- or 23, about a quarter of our samples during those two years failed the fish test."

I must confess to great difficulty in accepting his making of comparisons between the effluent from the BP Trafalgar Refinery and that of Suncor, as it seemed to be comparing apples and oranges. It was shown in evidence that at the BP Trafalgar Refinery some effluents were not used, and went back for reprocessing and in all cases the effluent had been passed through a most efficient biological treatment system much more advanced than that of Suncor. The BP effluent was treated by means of:

(1) floculation, which tends to have hydrophobic material (oil and grease) stick to it, which material would then not be available for deposit in the water. This could remove emulsified oils;

(2) activated sludge, a biological treatment method (bacteria) used in conjunction with aeration, and it is to be noted that aeration would volatize low molecular weight hydrocarbons.

I therefore find that I am unable to make valid comparisons between the Suncor effluent, whose effluent treatment was at best marginal, and the BP Trafalgar Refinery whose effluent was among the most efficient. Dr. Sprague further suggested that a concentration figure of at least 25 ppms for "oil and grease" would be required to kill 50% of the fish. He said that this figure required a good deal of intuition, which I have difficulty accepting as a proper scientific base. I am, of course prepared to agree the biological treatment can and does reduce the lethality of refinery effluents. In discussing samples taken at the BP Trafalgar Refinery, and their components of crude oil, such as naptha, kerosene, and gas-oil, Dr. Sprague said:

Q. "And those kinds of things are they found -- well let me ask you this: Are they similar to effluents, refinery effluent?"

A. "A refinery effluent could have those materials in it, yes."

Q. "But do you know, or have you made any comparison studies between refinery effluent and certain fractions, let us say gas-oil, naptha, and kerosene?"

A. "No, no." (p. 5398)

A. "The effluent was not necessarily representative of that discharge from the refinery. The waste was sometimes recycled through the treatment process until satisfactory."
(p. 5464)

Q. ". . now, when you--your research on the BP refinery in Oakville, did you prescreen the effluent for lethal effects before testing?"

A. "Yes, that was the first thing we did, and we tested for only 24 hours before deciding whether to use it for sublethal tests or not."
(p. 5501)

A. "Let's see now, I think our criterion was, if full strength effluent, if it failed, if it failed the test, the government test, when we either didn't use it in

> sublethal research, or we thinned it down, and failing the test would require that you kill more than half the fish in 24 hours in full strength."
>
> (p. 5502)

In the result, I cannot accept Dr. Sprague's intuitive figure of 25 ppm as a proper lethality figure for oil and grease, purporting to represent the minimum concentration which will kill 50% of the fish, nor am I prepared to accept the fact that the Suncor effluent which reached the river had similarity to the effluent that left the BP Trafalgar Refinery. The excellent treatment given in the BP Trafalgar Refinery and the prescreening given obviously meant that comparisons of toxicity could not readily be made. Moreover, Dr. Sprague admitted that both the Suncor effluent used in the Beckett bioassay, as well as the effluent used in the C & G bioassay would have been rejected from the Trafalgar study as failing all the criteria to be part of the BP Trafalgar test.

In referring to the matter of unit toxicity tables, Dr. Sprague concluded in looking at his results from the BP Trafalgar Refinery that the effect of a mixture of different toxicants, is less than that of the individual toxicants which of course is contrary to what might be stated as the general view as to synergistic effect and more particularly the view taken by Dr. Vandermuelen. On cross examination, the crown asked that Dr. Sprague should apply toxicity figures to the Suncor sample taken on February 17th, 1982 (14.9 ppm oil and grease) and for which there is a bioassay completed by C & G Labs, and an LC50 was obtained showing that at 53% effluent by volume half the fish would be killed. In completing this it appeared that the application of the toxic lethality figure given by Dr. Vandermuelen, ie: 10 ppm for "oil and grease", as contrasted with a figure of 25 ppm suggested by Dr. Sproule presented a much more accurate picture as to what happened in actuality in considering the accepted results of the C & G Lab bioassay (exhibits 183, 184). Moreover, Dr. Sproule stated that when the total toxic units equalled one, the effluent would kill half the fish, but when he applied his figure of 25 ppm as being the lethality figure for "oil and grease", and well known figures for the other contaminants, in the effluent, to the February 17th analysis (14.9 ppm oil and grease), he merely reached the total toxic unit figure of .518 (exhibit 183) whereas we know that in the C & G bioassay a 1 to 1 dilution was sufficient to kill 50% of the fish. Then when applying the same figures to the other toxicants but with Dr. Vandermuelen's figure of 10 ppm representing the lethality figure for oil and grease, the result was a much more reasonable toxic unit result of 1.02 (exhibit 184). Therefore, it would appear that Dr. Sprague's view that the Suncor effluent although containing considerable quantities of "oil and grease" would not be deleterious to fish, may well have been based on his experience with prescreened and well controlled biologically treated refinery effluent at the BP Trafalgar Refinery. In my opinion, he assumed that the BP Trafalgar Refinery has the same type of "oil and grease" in its effluent as did the Suncor plant, whereas we know that the Suncor effluent was lethal as shown by the C & G bioassay and the Beckett test. The resolution to this approach may be found in the fact that a fully adequate treatment of conventional crude refinery effluent, may in fact render it nonlethal or at least less lethal to fish. In the result, I am satisfied that 10 ppm of "oil and grease" in the Suncor effluent is a deleterious toxicant which may not kill quite 50% of the fish at the outflow pipe as it enters the river but it is clearly deleterious or likely to be deleterious. Moreover, I am satisfied that the total toxic effect of the effluent may in fact be larger than the individual toxicities of the components therein or at least the same. Where the evidence of Dr. Sprague and Dr. Vandermuelen conflict I prefer the evidence of Dr. Vandermuelen.

It should also be noted that in discussing the difference between synthetic crude and conventional crude, which also appeared to be a point of contention, Dr. Sprague said at p. 5400:

Q. "Let me ask you in terms of synthetic crude, do you know if that is similar to crude oils generally, in terms of its meakeup or composition?

A. "I have not made a comparison. I gather the objective is to make the synthetic crude similar to a crude oil. So, I would think they would be similar."

Q. "And one would, of course, expect that whatever toxicity there might be would be similar in that regard?"

A. "I would expect so. Various crude oils differ a little but in their toxicity, but I would expect this to be similar."

Q. "So, indeed, if synthetic crude, for example, got into water, then in terms of looking to toxicity, one could perhaps look to numbers of toxicity coming from crude oil, would that be correct?"

A. "I would think so, in general, yes."

Q. "Yes. And just taking that one farther step, if in fact, you had synthetic crude, it got into water, for example in the river, then one could use the toxicity numbers as perhaps proposed by Dr. Vandermuelen would they not be valid in the circumstances?

A. "Yes, taking account that his numbers are water accommodated fractions from crude oil. I would think it would probably be relevant.

Considering this and other expert evidence heard, but without reference to the effect of biological or other treatment used by particular plants, it is difficult for me to accept the position that the toxic effect of crude oils or similar products are that much different than those of synthetic crude, and I am prepared to accept Dr. Vandermuelen's broad ranges both as to lethality and sublethality and his evidence that a concentration of 10 ppm of oil and grease would cause sublethal effects on fish. It is to be noted that in a direct question by Suncor's counsel he said this:

Q. "Well are you prepared to give an unqualified opinion about whether these were harming fish in the river?"

A. "What concentrations are we talking about?"

Q. "On February 17th and March 9th."

A. "Those concentrations at the bottom of the pipe would be toxic and harmful to organisms, aquatic organisms in the river."

TAINTING

The significance of tainting under the "*Fisheries Act*" is that it may well be a consideration in determining whether the "use by man of fish" has been affected by the deposit of a deleterious substance in the river. Off-flavours are described as the hallmark of tainting and in many instances this results from exposure to petroleum hydrocarbons, but tainting may not inevitably arise from this exposure. Although tainting is described as a vague area where the literature is incomplete, there appeared to be agreement among the experts that there is a general class, namely, lower molecular weight hydrocarbons where you have the tainting factor, but the identification of the specific compound in petroleum that may cause taint has been difficult. Dr. Malins said:

> "---that animals such as fish exposed to water accommodated fractions of petroleum, readily take these components up in their bodies in varying degrees with respect to the individual components, store them to some extent and metabolize them to some extent, and that both the hydrocarbons and the metabolites although often concentrated very much in the liver are broadly distributed throughout the animal."
>
> (p. 3030, line 10 - 17)

The Ogata Paper as well as other scientific material stated that benzothiophenes, alkylated benzothiophenes, dibenzothiophenes and alkylated dibenzothiophenes were characteristic markers of petroleum taint from crude oil. This position was accepted by the experts and has significance when considering the evidence of Chittim, Birkholz and Kimble relative to compounds found in the analysis of the fish samples and sample 1302. The stated concentration range for "oil and grease" which may cause tainting according to Dr. Vandermuelen, whose evidence I have accepted, is low level concentrations within the range of 100 ppb to 2 ppm. Dr. Vandermuelen also confirmed that the material that caused tainting was found in the lower molecular weight fractions such as you find in water-soluble or water accommodated fractions.

SENSORY EVALUATION

This consideration primarily involved the evidence of Mr. Brown, and Roberta York, an expert on sensory perception who set up an experienced taste panel to ascertain and describe any off-flavours in fish samples and admittedly, this particular panel was most qualified, the defence contention being that a five man panel was too small and that York should not have participated in the panel. York, who was produced as an expert, described the purpose of a descriptive panel, and she indicated the following criteria for a panel had to be followed:

1. A known sensitivity to basic tests
2. Experience in flavour perception
3. Experience with a type of questionnaire to be used
4. Motivation, and
5. Willingness to participate

This experienced panel had no difficulty distinguishing other tastes from that of a petroleum taste. I have no difficulty in accepting the evidence of York and the tests that the panel provided, and I am totally satisfied that in the result, the tests showed that the panelists were perceiving a petroleum oil base type flavour in the fish, obtained from the Athabasca River and caught May 11th, 1982 downstream from the Suncor plant. I have no doubt that the panel could distinguish levels of intensity and that the Walleye taken from the river were basically found to be unfit by reason of the petroleum taste. A similar result occurred with respect to the Winnipeg whitefish which were exposed to sample 1302. Certainly one does not expect perfection in this type of tests and obviously in something as individualistic as taste, it would be most unlikely that you would ever obtain total agreement among any group of panelists. It should also be noted that Dr. Vandermuelen stated that fish from a gasoline, kerosene, or crude oil spills would have a decidely oily flavour.

With respect to the evidence given by Brown, that is another matter, for if prior to ruling that he was an expert I had been given the benefits of the subsequent cross examination I would have realized the imperfections of his test procedures. In the result I have given no weight to the results of his test panel.

The defence contended that the material relating to tests of this type should not be admitted in evidence, and counsel argued this point at some length. I took the position that it was admissible and I will not repeat my previous comments as my findings will be found in the transcript.

In considering the evidence, I have no difficulty in accepting that taint occurred in fish as a result of "oil and grease" released by Suncor into the water of the Athabasca River.

EVIDENCE OF FAICHNEY & SPAGNUT

Faichney gave evidence as to cutting a hole in the ice and sampling the water of the Athabasca River in the main channel some 30 miles downstream from Suncor. A sample of water was obtained on the 27th and 28th of February, 1982 and was described as being black and oily with a strong smell similar to that found in the settling bats of the Suncor plant. He described the situation as unlike any other he had previously seen in the river in winter time and I accept all the evidence of Faichney without reservation.

Spagnut gave evidence that throughout the years he had caught fish in the Athabasca near the wastewater outflow and in other areas, and particularly referred to a catching a large pickerel (a bottom feeding fish) on March 28, 1982 at a position estimated as being three hundred metres downstream in a deep hole at the rivers edge commonly known as the "hot spot". He stated that he perceived no off-flavours in the fish he caught. In view of his problems with language his evidence is not always totally clear, and I was unable to ascertain with certainty whether the large fish that he caught in March was eaten or whether he merely examined the gills and concluded that the fish was healthy, and thereafter surrendered the line and the fish to the wildlife officials. Be that as it may, there is no doubt that Mr. Spagnut is an ardent fisherman who is most interested in catching trophy fish. Notably he has lived continuously on the Suncor site since 1964 and one of his other sources for fish was admittedly the area of the river immediately adjoining the outlet from the sewage lagoon.

In considering the tentative location of this fish catching, the degree of exposure to concentrations of hydrocarbons, by fish at the edge of the river may arise. Dr. Gerard, a Hydraulic Engineer and expert on the mixing characteristics of rivers, modelled the Athabasca River and gave complex evidence as to determining concentrations in various parts of the river. In giving evidence he referred to a number of relevant factors, including delay in mixing caused by warm effluent water reaching the cold water, the effect of the jet stream from the outflow pulling the water downstream some distance before fanning out as a plume, the fact that mixing in the vertical plane may proceed comparatively quickly, but the horizontal mix may take a long time, and moreover that within the plume itself the maximum concentration is around the center line of the plume, whereas the edge may be a much lesser concentration. These matters caused me to consider whether the fish at the edge of the river in a deep hole known as the "hot spot" were exposed to the same concentration as the fish within the center of the plume.

There has been no suggestion that tainting occurred in the river prior to 1982. However, if the fully mixed concentration reached the fish, at the "hot spot", I may be left with conflict as to the matter of tainting, in which event I prefer the evidence of tainting provided by Miss York as to the taste test panel findings, particularly noting the criteria adopted in selecting the test panel. Having accepted the panel's results I could only then conclude that Mr. Spagnut's individual fish may somehow have avoided the concentration by its swimming pattern, or that his taste buds may have been conditioned to accepting some hydrocarbon load, and I do not think that his evidence in isolation is of great significance in considering the totality of this matter.

HODGE'S CASE

The defence suggested an alternative to the tainting which may have occurred as a result of the Suncor deposits made on the dates set out in the counts contained in the Information, this alternative being that an extremely large concentration of "oil and grease" allegedly escaped into the Athabasca River from the Suncor refinery in mid April, 1982 and caused the taint, and that based on the rule in Hodge's case it has provided the court with another rational conclusion. Hodge's case as stated by Baron Alderson cited in MacWilliams (end ed) at p. 75 is as follows:

> "In *Hodge's case*, 1838, 2 Lewin 227, 167 E.R. Baron Alderson stated the rule that in a case in which the evidence was made up entirely of circumstantial evidence, before the prisoner could be found guilty the jury must be satisfied "not only that those circumstances were consistent with his having commited the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person."

Application of this rule has always caused considerable difficulties for the courts and in the case of *R. v. John* 1971 S.C.R. 781, Ritchie J. expressed the view that Hodge's Rule is merely a manner of representing proof beyond a reasonable doubt. At page 791 he said:

> "I think that his criticism of the last of the above quoted paragraphs of the charge of the learned Trial Judge is founded on too rigid an adherence to the letter of the charge given by Baron Alderson to the jury in Hodge's Case which resulted in his treating the words of that charge as if they embodied a principle which was quite distinct from the question of reasonable doubt. It appears to me on the contrary that on analysis, the language used in Hodge's case does nothing more than provide a graphic illustration of the principle that where the evidence is purely circumstantial it must be made plain to the jury in order to be satisfied of the guilt of the accused beyond a reasonable doubt, they must first be satisfied that the circumstances are such as to be inconsistent with any other rational conclusion than that the accused was the guilty person."

Other cases appear to have adopted a similar view, and in the recent case of *Rex v. Kumar* 1984 6 W.W.R. 763, the Saskatchewan Court of Appeal in further considering a matter involving circumstantial evidence, examined the case law, including comment made by Ritchie J. in *Regina v. Cooper* 1978 1 SCR 860, and concluded that it was not necessary to apply the rule in Hodge's case, but that the trier of fact must be satisfied that there had been proof of the guilt of the accused beyond a reasonable doubt. It would therefore appear to me that the proper legal position was set out by Chief Justice Laskin (S.C.C.) in dissent in the case of *Regina v. Cooper* (supra) where at page 865 he rejected Hodge's formula as "an inexorable rule of law in Canada".

Irrespective as to whether this view should prevail, there is no doubt that any "rational conclusion" must be drawn from proven facts and in *Regina v. Harrinanan* 1978 40 CRNS 23, Laycraft J. (now Chief Justice of the Province of Alberta) said:

> "Before basing a verdict on circumstantial evidence, I must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the facts."

In then considering the evidence relating to the alleged mid April spill from the Suncor refinery through the "closed cooling water loop" to the river, evidence was given by Mr. Kostler of Alberta Environment, Mr. Johnson, Suncor's Plant Manager and Mr. Martin, Suncor's Water Environment Manager and liaison officer with the environmental authorities. In looking at this evidence in total it appeared to be vague, somewhat conflicting, and some of it was hearsay.

The evidence showed that in addition to the flow of effluent through the "wastewater system", there could also be a flow of water through another system known as the "closed cooling water loop" or the "new cooling water loop". When this was operating in the open mode, at least part of the flow was apparently diverted through a manhole where it would join the effluent water and then proceed to the river. Mr. Johnson, the Plant Manager while admitting that the system had problems, stated that this loop was intended by design to contain clean water and that during the winter months the water simply recirculated through the refinery, but that in the summer months due to the heat build up in the system it was placed in an open operating mode, which allowed the circulation of water from the river through the refinery and then back to the river, this being known as "once through cooling water". Mr. Johnson further advised that in the winter the system did not operate in the open mode as the valve was closed and that as a consequence, no water would normally pass through that system to the river. However, he said that as a result of the failure of the shut off valve, water apparently proceeded to the river all winter, and in referring to the valve he said:

> "The condition that I found the valve in was such that the valve had to be in that condition, that is with the sealing arrangement actually out of place which really meant that the valve was only partially closed. It could not stop the flow. That had to be in that condition at the time when the valve was closed."

Later, he said:

> "It was discovered that a valve which takes all or part of the discharge flow of that system, and diverts it to the river had failed and was passing. We were unable to determine when that valve failed. So that was the -- that failed valve was the mechanism for diverting the closed cooling stream to the river which in itself was contaminated because of a failed exchanger."

Q. "And how would the oil get out of the exchanger into the cooling loop?"

A. "It would leak through a leaking or cracked tube."

Mr. Kostler, of Alberta Environment shared the view that the system was closed during the winter and when asked from whom he obtained knowledge about the once through cooling water system and the fact that it did not operate in the winter he said:

A. "It would have been someone from Suncor -- I would have thought probably in a discussion with Bob Martin, that I can't say for certain."

Mr. Martin, Suncor's Water Environment Manager had another explanation as he advised that the cooling system was knowingly operated in the winter months. He said:

Q. "To your knowledge, was the cooling water system not in operation in the winter months?

A. "Oh, it was in operation, we used it all the time."

Q. "In the winter months? Do you know if it was in operation in the winter months?"

A. "Yes it was."

Q. "I'm talking about the specific once through cooling into the river."

A. "It was, it was in use in the winter time in to the best of my knowledge. Well yes, it is required -- it's required to use it."

Later he said when referring to the date of February 18th, 1982:

Q. "Had you become aware prior to that time or at that time that the loop was in fact open?"

A. "Yes, I was."

Q. Do you know why the loop had been opened?"

A. "My understanding at that time was that they wanted to ensure the ice didn't build up in the line."

When asked whether he thought that the loop was running in the river all winter, and the basis for his belief, he said:

A. "It is based on the realization in April when the decision was made to close the valve, when they attempted to do that they found they couldn't stop the flow to the river, and on further investigation they found that the valve had failed and it could not be used to its full potential."

Mr. Martin also had said:

Q. "Well being the person that would report the things to the government, or rather to the Department of Environment, do you recall ever reporting to the Department of the Environment that there was a change in the once through cooling system, the change being that it was going to be discharged to the river 12 months a year."

A. "No, as a matter of fact I believe I recall telling them that it had been closed off, and it was my understanding that it was going to stay that way."

Apparently that situation may not have prevailed, and there were two different positions taken as to the manner of operations as to the "closed cooling water loop" at the Suncor Plant, Mr. Johnson being of the view that the water proceeded through the system to the river solely by reason of a defective valve, when the flow was originally shut off for the winter; and no evidence was given as to that particular date. Mr. Martin seemingly did not agree and stated that throughout the winter the cooling water was proceeding through the loop into the river by intention and purpose and that in mid April of 1982 the failure of the shutoff valve became apparent when Suncor then attempted to stop the flow into the river. There was no direct evidence that on February 17th or March 9th, 1982 there was any flow of water through the "closed cooling water loop". Irrespective as to which view is the proper one to accept, as to their winter operations, the result would be the same, that is, some flow of water might pass through the "closed cooling water loop" into the river, which might in view of the evidence contain "oil and grease", and this quantity would not be included in the effluent analysis taken at the weir. It is unfortunate that Mr. Martin, who acted as liaison between the plant and governmental authorities, did not monitor the flow by sampling and analysis to determine whether water going into the Athabasca through the "closed cooling water loop" was a possible oil and grease source, particularly when he was aware of the oil staining on the Athabasca River, and that monitoring of the "once through cooling water" into the river was required pursuant to the provisions of the Suncor licence. Mr. Martin stated that he looked at the water passing through this system at night on February 18th, which did not appear to have oil in it, but no analysis was made, nor according to Mr. Martin was any further analysis made until mid April of 1982, and it would appear that Mr. Johnson, the Plant Manager was unaware that there was water flowing into the river throughout the winter by way of the "closed cooling water loop". It is to be noted from the evidence of the experts that a sheen on water will evidence an oil phase but a water sample without a sheen may nevertheless contain "oil and grease".

As far as the actual quantity of water that did in fact reach the river, that is also a matter of considerable conjecture in looking at the evidence. In seeking information as to what would happen when the loop was open Mr. Martin said:

A. "When the loop is open the water would flow down. I'm trying to remember, it may have — there may have been a branch off in 82. But anyhow it can also flow down the line which I have marked on the chart to the manhole, and then down to the second manhole near the river and out to the river with the outflow water."

Mr. Johnson when asked how the oil may have reached the river said:

A. "O.K. normally during the winter months that system is closed and is blocked in from the outfall. It was discovered that a valve which is -- which takes all or part of the discharge flow of the system and diverts it to the river had failed and was passing, we were unable to determine when that valve failed. So that was -- that failed valve was a mechanism for diverting the closed cooling stream to the river which in itself was contaminated because of a failed exchanger."

Although some of the evidence with respect to the "once through cooling water" was somewhat vague and some appeared to be hearsay, nevertheless there is little doubt that Mr. Johnson was personally present when a defective valve was taken out of the system sometime in mid April 1982, although again no one was able to advise of any particular date. He was then asked to comment on the flow through the defective valve and relate same to the flow at the time of the offences in February and March 1982 and he said:

> "Now to interpret that in terms of exactly how much water flowed through there, I don't know, I couldn't give you an answer to that question."

Presumably the question could not be answered without knowing other facts, among them being a determination as to the valve's condition on the date of the charges, a consideration as to how much water was then being pumped through the system, or whether the sealing agent at the bottom of the valve continued to disintegrate under pressure allowing the flow of water to become increasingly larger with time and these questions remained unanswered.

In the result, when asked whether there may have been varying quantities of hydrocarbons leaking out from the particular pipe in varying amounts, Mr. Johnson's answer was:

A. "I could stand here and say there was or wasn't that is a possibility."

A. "O.K. just a possibility of dilution of the effluent by clean water as a possibility."

A. "That is absolutely right."

In then considering the question as to concentration itself, it would appear from Mr. Martin's evidence that he may have obtained this information through a hearsay source. Mr. Johnson had considerable difficulty in recalling what the particular problem was with any degree of certainty, and I say this in a noncritical sense because obviously Mr. Johnson had innumerable considerations and decisions to make following the time of the original upset to the plant. Nevertheless, his evidence was this.

Q. "Do you know what kind of concentration of this refined oil was going out into the cooling loop water?"

A. "I'm going to have to think back, but I think -- I can -- I think there were samples, at least one. I think I can recall a 500 ppm number, but I'm going on memory."

No documentary evidence was placed before the court to confirm this position, nor was there any evidence as to how the samples were obtained, who did the sampling, or the volume of discharge that went into the river on that particular date. It would appear that neither Mr. Martin or Mr. Johnson personally completed any oil and grease tests and how this information was obtained was not clear. Nevertheless, irrespective as to what conclusion I should reach from this evidence, it was apparent that the defendant was the only perpetrator of the violations of the licence requirements, and I am satisfied on the expert evidence that tainting could result from fish being exposed to low level concentrations of oil and grease over a comparatively short period of time and that fish would remain tainted until the depuration process became fully effective. I am further satisfied that the concentration levels fo the deposits of "oil and grease" made by Suncor on February 17th and March 9th, 1982, reached the river through the wastewater system, largely in the form of a water accommodated fraction and were sufficient to cause such taint. It is notable that Dr. Vandermuelen in considering the various entrapment devices in the duckpond and the wastewater pond said:

> "I think that given all those filtering and entrapment devices, and given the fact that you have got 46 acres of water which is very slowly releasing a certain hydrocarbon load from it, I would and considering concentrations that I saw yesterday, in the table over that period of time February 1982, I would tend to consider it as a water accommodated fraction similar to the blue lower phase in the right hand bottom corner in the flask."

I was also satisfied on the evidence that tainting would likely arise from exposure to"oil and grease" in the range of 100 ppb to 2 ppm and that tainting would occur upon exposure to low molecular weight hydrocarbons as would be found in the water accommodated fractions. Dr. Sprague spoke of reports of spills at a Calgary refinery which appeared to confirm the fact that you will have tainting at a low concentration and not at a high concentration.

I have concluded that tainting of fish did arise from exposure to Suncor's oil and grease deposits into the Athabasca River, more particularly, those occurring on February 17th and March 9th, 1982.

I am further of the opinion that if "oil and grease" reached the river in a concentration as great as 500 ppm in mid April then on the expert evidence heard, I have concluded that it would not have been in the form of a water accommodated fraction which is the fraction available to fish, but would simply have been an overloaded "oil and grease" sample containing a great amount of surface oil.

Moreover in further considering the wording of Section 33 (11)(b) of the "*Fisheries Act*" which I have referred to earlier in this judgment and the particular wording of the amendment, namely:

> "or is likely to be rendered" deleterious

even had I accepted the fact that the high concentration of 500 ppm could have resulted in some taint, I nevertheless would be of the view that "oil and grease" deposited in the river by Suncor on February 17th and March 9th of 1982, was likely to taint.

BIOASSAY EVIDENCE

Three bioassays were completed on Suncor effluent, namely the Beckett test, the Chemical and Geological Laboratories Ltd. test, and a test that was completed on the water soluble fraction of sample 1302, namely, the Murray/Billeck/Lockhart Test.

The Beckett tests which was performed with wastewater at full concentration obtained from the weir on March 9, 1982, admittedly was not a true LC50 test in that it did not determine the concentration where 50% of the fish would die, but nevertheless, all fish in the effluent died within 24 hours. The sample was found to be dark brown with a strong petroleum odour. Beckett described it as acutely lethal, and having considered all the evidence, I have concluded that oil and grease was the major toxic component therein.

In the Chemical and Geological test this bioassay (exhibit 16) was performed by a commercial laboratory hired by Suncor to do these types of tests, as well as other analytical work. The test was performed on a sample obtained at the wastewater outfall February 17, 1982 and was a true LC50, being a standard bioassay performed at various concentrations. In the result, the LC50 was stated as being 52% by volume which basically means that if the effluent was diluted on a 1 to 1 basis, 50% of the fish would die. However, without aeration, which was used in this test, this figure would have risen considerably, as the scientific evidence was that non-aeration would most closely paralled the situation in the Athabasca River where fish were swimming under the ice. It was obvious from the evidence that toxicity from oil and grease was the major toxic component in the effluent and it was notable that Dr. Sprague a defence witness, used the C & G bioassay results in making a unit toxicity table and appeared to find this test acceptable.

The Murray/Billeck/Lockhart tests showed toxicity and were completed on sample 1302 (95 to 97.5% oil and grease) which was effectively all oil and grease considering that all tests preclude obtaining 100% recovery. It is a most significant factor that among the tests done Murray did one using a true water soluble fraction on which a bioassay was performed. This was not a water accommodated fraction and consequently it did not contain any significant proportion of microdroplets of oil. Dr. MacKay, whose evidence I accepted, stated that a true water soluble fraction would not contain significant alkane peaks and such was the case herein. Consequently, in one test using a 25 ppm concentration Murray was able to calculate the amount of water soluble fraction at which mortalities were observed, which was .18 ppm WSF. This killed 50% of the fish but that test was not significant in that the most important part of the sample and that part which would contribute greatly to toxicity was not included, that being the water accommodated fraction, that fish are generally exposed to and which itself includes the water soluble fraction. Consequently the test that Murray performed, in my opinion would considerably underestimate the total toxic effect of sample 1302.

Notably, Dr. Sprague suggested that the procedures used were good, but he expressed concern about the size of the fish that were used in the test. Mr. Beckett suggested that larval fish used less oxygen than larger ones and that it would be a wise measure to use them when no aeration was being added due to a desire to test for volatile materials. Considering that the matter to be determined is the deleterious effect of "oil and grease" on fish in all stages of their lifecycle, I find nothing wrong in using larval whitefish in this type of test.

Murray moreover stated that aromatics are expected to be in water soluble fractions such as ethyl benzene, zylene, substituted benzenes, isopropyl benzene, and those are the type of compounds that were in actuality identified by Birkholz in the water soluble fraction of sample 1302 and by Chittim in the fish caught in Jackfish Creek.

THE DEFENCE

The defence argued that the measuring techniques used in the Suncor Laboratory to determine the amounts of "oil and grease" deposited in the Athabasca River on the dates set out in the individual counts of the Information, were inaccurate both as to their manner of measurement and also as to their calculation in total. They therefore contended that no reliance should be placed on those "analytical" results provided to the Governmental authorities by Suncor, pursuant to the requirements of its "Clean Water Licence". Defence counsel also argued that the crown had failed to prove that the substance or substances deposited in the Athabasca River were deleterious, and advanced the position that Suncor had shown all due diligence both in preventing the escape of oil into the Athabasca River and also in cleaning up the resulting spills.

RELIABILITY OF OIL AND GREASE TESTS

In the metering shack that stands above the weir, which conducts water from the duck pond to the outflow, are a number of measuring devices. For the purposes of the trial two of these are of interest. One is an automatic sampler and the other is the flow measurement recorder which traces on a graph the height of water going over the weir. The automatic sampler is used to produce samples both on a time and flow basis from the water going over the weir and these samples are analyzed in the Suncor laboratory for various substances that may be contained. The proportion of each of these substances is then multiplied by the flow over the weir for a given day, to give the amounts of materials deposited into the Athabasca River for each twenty-four hour period. Under the terms of the licence under the "*Clean Water Act*", Suncor is permitted in their reporting of the "oil and grease" levels to deduct the base amount of "oil and grease" that is analyzed as occurring in the river on that day, and this concentration is subtracted from the day's figure before being multiplied by the flow figure. A sampling device upstream of the plant would provide samples for analysis in the laboratory in order to obtain this figure. Suncor attacks the reliability both as to sampling and analytical methods used by the analysts, not only with respect to their own tests, but governmental tests and for that matter tests performed by Chemical and Geological Laboratories Ltd. which is a commercial laboratory that did analytical work under contract for Suncor.

The defence has admitted in argument that the composite sample which is a 24 hour composite sample with at least 96 sample intervals, is representative of the composition of the Suncor effluent coming over the weir, and these are the primary figures used in this case. In considering other samples, Dr. Kratochvil made reference to the fact that a grab-sample may not be properly representative of composition, and that could be the acceptable position if I was required to consider in complete isolation a single wastewater grab-sample, without other background material. However, such was not the case herein, for there were many grab-samples taken, these being available for intercomparison, and for that matter for general comparison with Suncor's composite samples. Therefore, one could be assured of the basic reliability of the grab-samples. This of course, is borne out by perusal of Appendix 1 (exhibit 16) setting out the various grab-sample results for February 17th, 1982 which showed "oil and grease" readings as being Suncor 21.8 milligrams a litre (mg/l), C & G Labs 16.2 mg/l and Ablerta Environment 15.2 mg/l.

(Note mg/l = ppm). Dr. Kratochvil further stated that if one knew the results of a composite sample taken over a 24 hour period on a particular day and this reading fell within the range of 10 to 30 milligrams a litre, then a grab-sample taken on that day with results of approximately 15 or 25 milligrams a litre would not be unrealistic. When one then considers that the composite sample for February 17th, 1982 was 14.9 mg/l the acceptability of the grab-samples become apparent. It is further to be noted that there are some expected differences in analytical results, which are the norm, and can be inferred to sampling techniques and also to differences between the various solvents used in the tests.

With respect to sample 1302, this was almost totally pure oil in excess of 95%, and the general opinion which I accepted was that it was weathered oil which had been subject to a cracking process, found in the wastewater pond. There is substantial information as to the particular composition of that material as Mr. Johnson, Suncor's Plant Manager related the kind of material that had resulted from the unifiner purge, and this would mean that the material that should have been on the pond was indeed there.

Further evidence showed that there are two basic methods of testing for "oil and grease", namely the partition gravimetric method and the infrared spectrometric method which was used by Suncor. In order to dissolve the "oil and grease" out of their samples, the Suncor Laboratory was using carbon tetrachloride rather than the more commonly used "freon" which was the solvent stipulated in the "Clean Water Licence". The expert witnesses agreed that carbon tetrachloride is a more effective solvent than freon. Dr. Kratochvil and others advised that the gravimetric method would blow off lower molecular hydrocarbons, and Dr. Montgomery stated that the sample at the weir would contain those low molecular hydrocarbons. Therefore, Suncor's infrared measurement, using carbon tetrachloride as a solvent would result in a truer and more accurate value being obtained when analysing "oil and grease" samples. One must of course recognize the fact that there is no known test for "oil and grease" that will analyze all the oil in a sample.

With particular respect to the question of a split sample, the defence contended that the sample was unreliable because of this techniques, that is, that one should avoid subsampling, to prevent errors in the amount of "oil and grease" in the sample, as some "oil and grease" may stick to the sides of the container. In considering all the evidence, it would appear that if a sample was obtained by being poured from the original container and this resulted in any oil loss, the true amount of "oil and grease" contained in the sample may be underrepresented by the figures shown in the Suncor analysis. Dr. Kratochvil further said that one might pour off some floating material which would result in a counterbalancing error. Therefore it appeared to me that Suncor was not prejudiced by this process of split sampling but obviously a procedure by which the whole of the original sample was analyzed would be more satisfactory.

The defence further argued that a bias was introduced into the Suncor analyses due to the use of an unsatisfactory calibration curve. The crown had adduced evidence from Mr. Kristianson who was in charge of the Suncor Laboratory and Ms. Keashly qualified as an expert relating to the direction, instruction and explanation of certain analytical procedures carried out as they related to "oil and grease", and both of these witnesses had "hands on" experience with these matters. Mr. Kristianson said that there was very little deviation between the calibration curve used for the Suncor analyses made in February and March of 1982 as compared to the new calibration curve constructed in April of 1982 and he was satisfied that Suncor's "oil and grease" readings as reported to the

Governmental Authorities were accurate. He also stated that the material used in preparing the more recent 1982 calibration curve was a no. 5 oil, taken from the Suncor plant itself and not an unknown reference, and from the evidence heard that would appear to be a desirable situation. Ms. Keashly stated in her evidence that she had been involved in using various oils such as common cooking oil, pump oil, and an unknown oil reference (EPA) for the purpose of intercomparing calibration curves and that the calibration curves were similar even though she had changed from one oil to another. Consequently, I am of the view that the Suncor analyses were fair representations of actual "oil and grease" contained in the tested samples, and I am not prepared to accept Dr. Kratochvil's view that there could be error in the range of a factor of 2 caused by deficiencies in Suncor's analytical techniques.

In considering the particular evidence of Mr. Timpany, who was qualified as a Hydraulic Engineer, he took issue with the recorded flow rates going over the weir, which he suggested would affect the mass discharge figure. Evidence was given that a weir is constructed in a certain way and with certain features so that the flow of water over it can be calculated by measuring the height of the water above the lip of the weir. The defence took issue with the ideality of Suncor's weir and pointed out features that allegedly detracted from this ideality although some of these no doubt compensated for others. Mr. Timpany stated that the most accurate way of calibrating a weir was with the dye test, but that a calibration had not been made in any manner, as this would require a month in time and many repeated tests with more accurate equipment and different methodology. He therefore endeavoured to do several tests which he stated might serve to provide a rough estimate in considering possible error, namely a falling head test and an accumulation test. Some preliminary problems were met in endeavouring to complete these tests, such as the inability to complete dry runs to work out techniques and logistics. It is notable that in one of the tests which required measurement to be made with a "very sensitive device" this appeared to be a metre stick. In considering these tests, Mr. Timpany stated that his indication of inaccuracy of the weir "should not be considered as a calibration suitable for use for any future measurement of the weir".

Of greater importance in determining any potential error, was a consideration of the mechanical flow measuring device, which had a dial allowing one to establish the factors of K & M, that is,

> "its a matter of dialing of the right numbers here for the appropriate scale and then the ideal weir formula is then programmed as an integral part of the flow measurement device itself."

Mr. Timpany admitted that he had no knowledge as to what settings were recorded for K & M at the time of the alleged offences, or whether any attempt was made to compensate for ideality. In referring to this inability to obtain records of settings in February and March 1982, he said:

> "that creates a high degree of uncertainty for me being able to predict with any accuracy what the flow was during that period."

Obviously any conclusions reached by Mr. Timpany involved a great deal of speculation and nothing that was given in evidence would cause me to conclude that the mass discharge figures given by Suncor to the Environmental Authorities and covering the dates of the offences herein were other than substantially correct.

LAW RESPECTING SUNCOR "OIL AND GREASE" TESTS

The defence submitted the case of *R.* v. *Oliver, Oliver* v. *Henderson* 1981 32 AR 552 for consideration arguing that it parallels the case at bar, the position being that the 1972 calibration curve was made by an unknown person of unknown qualifications on an unknown substance using an unknown method, and that this is evidence to the contrary, so that Suncor's analytical evidence as to "oil and grease" readings should not be given any weight. Originally this matter was argued with a view as to the initial admissibility of Suncor's "oil and grease" readings, as evidence. At that time, argument proceeded at great length and I will not again repeat my comments on the question of admissibility, which were given at page 395 - 399 of the transcipt.

If the concern of the defence at this time is whether I gave a proper judgment on the matter of admissibility of evidence, my position remains unchanged. Basically I was of the opinion that:

(a) The *Oliver* case had application to the specific provisions of the "*Narcotic Control Act*" where the court was considering the words "evidence to the contrary" as set out in that particular section of the Act.

(b) The dismissal of the charge in the *Oliver* case was based primarily on the principle that the crown had not proved its case beyond a reasonable doubt.

Having admitted the evidence, I am of the opinion that the presiding judge must consider what weight should be given to that evidence.

DUE DILIGENCE

The leading case in this matter is *Regina* v. *City of Sault Ste Marie* (1978) 21 N.R. 295 S.C.C. where the Supreme Court of Canada defined three categories of offences and considered the application of "mens rea" or intention to each of those categories. It was held that if the consideration was that of a public welfare offence then the crown need to prove "mens rea" on the part of the accused, but the accused could raise a defence of reasonable care. That of course is a principle now ensconced in the common law.

Moreover, a further but more limited defence of due diligence is specifically referred to in the "Fisheries Act" in Section 33 (8) thereof, which states:

> "in a prosecution for an offence under this section, or Section 33.4 it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission."

In *Regina* v. *Placer Development Ltd.* (1983) 13 C.E.L.R. 42 a detailed canvas was made of the standard of care required and Stuart Terr. Ct. J. at page 51 said:

> "To constitute a defence pursuant to this section, all due diligence must be exercised. While not tantamount to absolute liability, more than the care expected to an ordinary citizen is demanded. In the very least, the care must reflect the diligence of a reasonable professional possessing the expertise

> suitable to the activity in issue. (*R.* v. *Giftwares Wholesale Co. Ltd.* (1977) 36 C.C.C. (2d) 330).
>
> No one can hide behind commonly accepted standards of care, if, in the circumstances, due diligence warrants a higher level of care. Reasonable care implies a scale of caring. A variable standard of care ensures the requisite flexibility to raise or lower the requirements of care in accord with the special circumstances of each case. The care warranted in each case is principally governed by the gravity of potential harm, the available alternatives, the likelihood of harm, the skill required and the extent the accused could control the casual elements of the offence. (*R.* v. *Gonder* 62 C.C.C. (2d) 326 at 332)."

It appears that among the criteria one is obliged to look at, there should be a consideration of the gravity of potential harm and its likelihood, whether the accused took reasonable care, and perhaps measurement of same by comparing it with what was done, against what could have been done, and whether it could have been controlled by reasonable foresight and preventive steps. The defence is obliged to prove reasonable care on a balance of probabilities and certainly wisdom after the event is not a true test, as perfection in not the standard, and the accused is not an insurer. In *Regina* v. *Sault Ste. Marie* (supra) Dickson, J. at page 323 set out the test as follows:

> "The test is a factual one based on an assessment of the defendant's position with respect to the activity which it undertakes, and which causes pollution. If it can and should control the activity at the point where pollution occurs then it is responsible for that pollution."

It therefore appears that any determination herein on the matter of due diligence, of necessity involves a comprehensive consideration of all factual circumstances that brought about the escape of oil into the river, and more particularly what was done to prevent same. Some general observations will be made but it should first be noted that although the defence did not in its earliers argument subscribe to the view of Seaton J.A. in the case of *Rex* v. *MacMillan Bloedel (Alberni Ltd.)* 1979 4 W.W.R. 654, it was nevertheless prepared to accept Seaton J.A.'s position where he said at page 655:

> "The Appellant was prepared for this sort of action, and the response was prompt. Very little oil spread beyond the dock and the clean up was carried out relatively quickly. If an offence was committed when the oil was spilled the containment of the oil and the prompt clean up would be relevant to the sentence but not the conviction."

It might be observed that the *MacMillan Bloedel* case (supra) was determined under the provisions of Section 33 (11)(a) of the "*Fisheries Act*" and I have agreed with the defence that the aforesaid section may refer to an accidental or intentional spill of a somewhat "pure and homogenous" "substance" as differentiated from the considerations herein under Section 33 (11)(b) where process water released under licence was being considered. The above statement by Seaton, J.A. appeared to be the only reference to the question of whether promptness of clean up was a consideration in determining whether due diligence had been exercised, or whether it was only a matter for consideration in sentencing. The crown took the position that the remark was "obiter" pointing out that the conjunctive "if" appeared at the beginning of the last line presupposing a condition, and that there was no attempt to lay down a proposition of law. Irrespective as to whether that view is correct, it is my intention to consider the matter of due diligence as it might apply both before and after the deposit of "oil and grease" into the river on February 17, 1982, particularly bearing in mind that there may have been a continuing contamination which may well be a matter of concern with respect to the subsequent offence alleged to have occurred on March 9, 1982.

Among the criteria set out for consideration in matters of due diligence are gravity of potential harm, available alternatives, likelihood of harm, the skill required, and the extent the accused could control the casual elements of the offence.

In looking at the factual scene herein and the particular events of December 21st, 1981 and January 21st and 22nd, 1982 the potential for substantial injury was ever present, and each of the various events impacted directly, one upon the other finally resulting in the charges herein. There had to be a primary consideration of the key role played by the flare system as an overall component in considering plant safety. The compressor house fire of January 21st, 1982 resulted in a purge of substantial quantities of hydrocarbons from the unifiner to the flare area, and because the flare was still crippled from the December 21st, 1981 fire, it was unable to cope with the surge of liquid hydrocarbons. It was later discovered that the safety valve in the diluent recovery unit had failed so that diluent was flowing through the flare system to the wastewater pond, and subsequently, in my opinion into the river.

Having regard to the matter of the foreseeability, the defendant should surely in conducting its operation have had certain basic concerns in mind, namely, that it was required to have an effective wastewater system with a recognition of the fact that the various ponds in the wastewater system were there for a particular purpose, that is, they were settling ponds, the purpose being either to have oil or other contaminants rise to the surface where they could be dealt with, or cling to the sediment at the bottom of the pond, and there should also have been some effective method of preventing escape of "oil and grease" to the river by way of "dissolved or emulsified oil". It was obvious that for a lengthy period of time both before and after the time of the alleged offences the wastewater system was ineffective, or at best, marginal and the amount of mass discharge of "oil and grease" greatly exceeded the limits set out under Suncor's "Clean Water Licence" and the concentration levels were above the normal range.

One cannot but be sympathetic to the position of Suncor in view of the fact that they were having great difficulty with the plant for lengthy periods of time culminating in the failure of the safety valve with the resultant total loss of the flare system. The fact, however, remains that knowing all the problems and the risks thereof, Suncor continued to operate the plant and Mr. Johnson, the Plant Manager in giving evidence said:

> "I believe the low operating rate in the coking plant which caused the diluent recovery unit to be operated at a low charge rate contributed to a major upset condition on the diluent recovery unit which relates directly the failure of the psv on the diluent recovery unit."

Suncor made a judgement call and the alternatives did not provide a happy solution as it may well have meant total shutdown of the plant in winter with the consequent damages from the frigid weather conditions. The plant may then have been unable to reopen due to the company's financial situation at that time, and 1800 people may have been thrown out of work. These, of course were speculative factors that could only be answered by the directors of the company, but nevertheless, they did not make the task of decision making easier, even for a man with Mr. Johnson's broad general experience in refinery work.

In considering the totality of the evidence it was apparent that in the plant operations there seemed to be a singular lack of concern with the wastewater system and more particularly recognition of the principle of emulsification. Dr. MacKay, whose evidence I accepted said:

> "Indeed one of the principle headaches of petroleum refineries is to get rid of the emulsified oil from it's water effluent."

Clearly, Suncor should have been aware that the emulsification of oil would likely occur but they appeared to have few people involved in wastewater management and no expert in that particular field.

With respect to the matter of dyke failure, the evidence was largely of a second hand nature, but it appeared that a small, underground steel culvert had broken and allowed effluent to penetrate the dyke, bypassing the underflow pipes. This culvert apparently did not appear on the original blueprints and no one knew the leak started. In speaking of the leak, Mr. Johnson said:

> "--- and I believe from what I have seen, and what I have heard others say ---"

Again, this is not an area where the evidence provided great clarity, but in view of the high readings for oil and grease since late 1981 as evidenced by Dr. Sprague, Mr. Johnson and others and in light of the accepted scientific figures for solubility of "oil and grease" in water, it should have been clear that the high readings could only be achieved by a fault in the dyke, a failure in the design of the decant lines from the wastewater pond to the duck pond, recognition of the principle of emulsification or a combination of these factors but these implications appear to have been ignored.

Another known hazard which might well have been looked at with concern since the beginning of plant operations was the location of the flare with reference to the position of the wastewater pond. In considering the huge fire that occurred on the wastewater pond, on January 22nd, 1982 it was obviously a matter of considerable importance and in discussing the location of the flare Mr. Johnson said:

> "Let me say that one thing that is somewhat unusual is the distance of the flare pond in close proximity to a major effluent pond that you know -- you normally don't find flare areas close to ponds."

In then considering the whole of Suncor's continuing plant operations prior to the offences set out in the Information, it should be noted that after the original compressor house fire, the coking plant was operating at a very low rate, the primary cause being the continuing high pressure tube failures in the main coke fired boilers. The basic problem of boiler failure was ever present and was referred to on numerous occasions by Suncor's Plant Manager, and accordingly their failure impacted on the ability to produce diluted bitument to satisfy the coking operation. Consequently, the charge to the coking plant was reduced to a lower safe operating level and as stated by Mr. Johnson the low charge rate contributed to a major upset on the diluent recovery unit which relates directly to the failure of the psv (pressure safety valve) on the diluent recovery unit. Mr. Johnson further said:

> "... we also believe, and I firmly believe that with the flare equipment severely damaged in the fire that occurred on December the 21st, that we simply taxed a crippled system beyond its capability to do the job."

Later, in reply to questions about the risk of running the plant at very low rates, Mr. Johnson said:

Q. "So you were essentially operating in a situation that had a potential for danger, I suppose?"

A. "There was risk associated with operating the unit at the low rates. Yes."

Q. "So you were in a sense running a risk to avoid a risk in the future?"

A. "Yes I think you could -- well, we were doing what we judged to be the least of two evils. Either choice was not a good one."

Considering these statements it is difficult to suggest that the problems which arose from the plant operations were unforesseable.

I also had cause to question Suncor's monitoring operations which obviously should have made them aware of the deposits of "oil and grease" in the river at a much earlier time. It was apparent that there was oil staining on the Athabasca River at a point immediately adjoining the Suncor plant, as early as February 12th which had not apparently been noticed until several days later. After being advised of the situation by Fish and Wildlife Personnel, Suncor thereafter contacted Supervisory Consultants, a company which engaged in surface clean up of oil spills, but did not direct their attention to such matters as emulsified oil, nor did it appear that they were asked to consider the oil in the river or oil under the ice. Some further 6 or 7 days went by before Suncor asked Supervisory Consultants to commence actual clean up operations which then began on February 23rd of 1982. The work continued until sometime after the second offence occurred on March 9th, 1982, and the clean up of surface oil appeared to continue satisfactorily, but some of the experts suggested that both aeration and emulsification breakers should have been used to deal with emulsified oil, and these may have been helpful.

Dr. Green stated he was unaware of any approved emulsion breakers that could be used for direct flow of effluent into the river, but Dr. Schmitke, a crown expert suggested that there were emulsion breakers that Suncor should have tried as well as other methods of attacking the problem of emulsified oil. He further suggested that something as simple as alum might have been used in an endeavour to speed up the emulsification process, so that surface oil could have been removed in the conventional manner.

Nothing further was done other than the surface clean up, and although these other alternatives may have been difficult to apply in practice considering ice conditions, nevertheless, it is my opinion that these matters should have received the attention of experts familiar with wastewater problems who may have offered other solutions.

It was moreover apparent in considering the monitoring sections of the licence that daily discharges of "oil and grease" through the wastewater system for some time exceeded the licence limit and no effective monitoring of the "once through cooling water" was carried out. Notably, some time after the "Water Quality Control Order" was given by the Environmental Authorities, and subsequent to the end of March 1982, Suncor made effective changes to the wastewater system so that they now have a satisfactory system where "oil and grease" readings are consistently less than 10 ppm. Among the various changes made, the wastewater pond was totally dredged, the dykes were rebuilt and the wastewater system now consists of a 4 part facility with 3 ponds in series and a major backup basin in the event of problem situations.

In reply to the defence contention that Suncor had exercised all due diligence, the crown in rebuttal called Dr. Napier, a most knowledgeable and interesting witness who was an expert on disaster prevention and hazard analysis and who testified as to the possibility of preplanning for potential disasters and analyzing plant operations to foresee possible problems. These methods of analysis may indeed be most desirable if applied to industry and it may well be that in future years, these considerations may have considerable impact on the outcome of trials, particularly in civil matters. Although these practices have been applied in Europe and some parts of the United States, other than in isolated instances, loss prevention and hazard analysis does not appear to be a well recognized practice, engaged in by industry in Canada and, irrespective as to the desirability of same, it would be unfair to impose a higher standard of foresight upon Suncor than presently exists in our industrial mainstream.

I do, however, feel that in considering the evidence of Dr. Napier that it is incumbent upon me to comment upon one further matter, that being the suggestion that because of the many plant problems and the various fires, that the plant should have been shut down and that this would have eliminated any further hazardous situations and particularly the danger to personnel. It is, of course, easy to make sage observations and come to conclusions after the fact, when you have had the benefits of time for full consideration. In retrospect and certainly in Dr. Napier's opinion, an early closure might have been the best course of action, but I am totally satisfied that Mr. Johnson, in considering his options and the effect of total closure, did in a crisis situation make a judgment call, and that in considering the many potential problems that might arise, safety to personnel was always paramount, and of top priority.

Nevertheless, Suncor must certainly have been aware of, and should have considered the many know inadequacies in their own plant operation. Mr. Johnson was most forthright in his evidence that the plant was almost 20 years old from the standpoint of conception, and it required reworking, major rewiring, rebuilding of the boilers, new instrumentation and there was certainly recognition of the fact that the wastewater system needed upgrading. There was also the admission that the company perhaps due to its many problems was some years behind in applying current scientific knowledge and practices to plant operations. Mention was made of a contemplated plant integrity program which was in the formulation stage, but little seemed to have been done to effect change until after the Water Quality Control Order of Alberta Environment was given, and subsequent to the end of March, 1982 the wastewater system was altered and upgraded with considerable success.

I find that by a combination of inexperience, delay and failure to obtain outside expertise, merely being content with inhouse knowledge relevant to wastewater management, coupled with other inadequacies that I have spoken of herein, this amounts to lack of due diligence. A further lack of an attempt to consider cleaning up of the Athabasca River on first being made aware of the leakage or to seek expert advice on the problem, or even to contemplate that there would be oil under the ice is somewhat surprising. In cross examination Mr. Johnson said:

> "Where there was oil following that break up of the ice and the shifting of the ice to the outflow structure area, the duck pond area, there was an unexpected accumulation of oil in broken up ice chunks and emulsion in that particular area."

Clearly, this accumulation of oil under the ice should have been expected and it is notable that the situation which transpired with Suncor operations in the year 1982 appeared to be a repeat performance of a similar situation that occurred at the plant site in the winter of 1976/1968 and is adequately documented in exhibit 150 being a letter dated September 25th, 1968 from Great Canadian Oil Sands Limited (one of 2 companies amalgamated for purposes of forming Suncor) to the Honourable John Chretien. A perusal of that letter would certainly have identified many of the problems that required consideration in the year 1982.

In the total result, having considered all the evidence herein, I have rejected the defence of due diligence.

CONCLUSION

On the whole of the evidence I am satisfied that the crown has proved that Suncor did deposit a deleterious substance, namely, the plant effluent, the major toxic portion of which was "oil and grease" into waters frequented by fish on the dates set out in the Information. The defence has suggested that other toxic compounds contained in the effluent, namely phenols, ammonia or sulphides may have caused the toxic effect upon the fish. In considering the concentration levels of those particular toxicants in the Suncor composite samples, the readings are most minimal in comparing same with their known toxic lethality figures. The specific evidence relating to phenols was so limited as to be without value which perhaps is understandable, in view of the fact that at the time of commencement of this trial there were still 13 other charges pending against Suncor, alleging phenols as being the particular toxic material in the effluent, and little evidence was given relative to phenols in this matter. Notably the crown has now stayed these charges. It is further apparent that in looking at almost any other effluent samples taken, they show comparatively low levels of these other suggested toxicants namely, ammonia or sulphides and there were substantial levels of "oil and grease" in the samples. I am satisfied that "oil and grease" constituted the major and dominant contaminant causing toxicity in the effluent. As I am cognizant of the fact that an oil and grease test will not detect all of the "oil and grease" in the effluent sample, I am also satisfied that a fish would not see all of the amounts of "oil and grease" as contained in the composite sample and some amount of surface oil may have been picked up in the oil and grease readings despite Suncor's contention that there was no way in which surface oil and grease could get through the entrapment device, for these devices may not be 100% efficient. Moreover, there may have been some evaporation or other "oil and grease" losses. However, in the result, it is my opinion that on the dates in question that the great bulk of "oil and grease" passed through the Suncor wastewater system in the form of oil in solution, and of greater importance, oil in the form of microdroplets (emulsified oil) both of which would be contained in the water accommodated fraction flowing into the Athabasca River.

Notably, a sheen is a separate oil phase which would show that oil was escaping from the wastewater pond over the weir, but the evidence has also shown that the mere nonpresence of a sheen does not mean that there is no oil present in the sample. I was further satisfied on hearing the evidence that toxic effects on fish will increase with additional exposure, and in this case I was concerned with sublethal effects and not lethal effects. Sublethal effects can be observed within as little as 24 or 48 hours, but certainly, the longer the exposure, the greater the deleterious effect.

The measuring techniques used by the defendant in my opinion were substantially accurate so as to establish levels of "oil and grease" deposited in the Athabasca River, and I am satisfied that without any consideration of the "oil and grease" which may have reached the river through the "closed cooling water loop" or other unmonitored sources, and also considering any probable effects of dilution, the deposits made by Suncor on February 17th and March 9th, 1982 were likely to be deleterious to fish, there being "oil and grease" concentrations in excess of 10 ppm at the weir, the concentrations level given by Dr. Vandermuelen and accepted by me as likely to cause sublethal effects to fish in the river. Moreover, in reaching that determination I was particularly cognizant of the factual scene as I found it, namely, that "oil and grease" readings at that level (10 ppm) and higher had continued for a number of days prior to the dates of the charges and as well the volumes of "oil and grease" reaching the river by way of mass discharge also greatly exceeded the allowable limits provided by Suncor's licence under the "Clean Water Act". I further considered any reasonable inferences that were afforded by way of evidence as to plant operations and it was also obvious that the effluent on the particular dates in question would not pass the standard lethality test, which meant that more than 50% of the fish would be killed in a 96 hour bioassay, this being the basic consideration used in considering whether the effluent of a conventional refinery is acceptable.

Dr. Vandermuelen, whose evidence I accepted when asked for an unqualified opinion as to the toxic effect of "oil and grease" readings on both February 17th and March 9th of 1982 stated:

> "Those concentrations at the bottom of the pipe would be toxic and harmful to aquatic organisms."

Moreover, at the time of that comment he had been made aware of much of the factual scene as it relates to these proceedings.

In applying Dr. Vandermuelen's values with respect to "oil and grease" toxicity, and considering the fully mixed concentrations in the river for both February 17th and March 9th, 1982, as shown on the Dr. Gerard models (exhibits 85 and 86), the concentrations would appears to have sublethal effects on fish. Dr. Gerard is a Hydraulic Engineer who applied Suncor's composite "oil and grease" readings taken at the weir on the aforementioned dates and gave evidence showing the resulting concentrations at various distances in the Athabasca River as the effluent left the outflow pipes and mixed in the river. The evidence was highly technical but basically unchallenged by the defence, and I accepted this evidence. Dr. Vandermuelen in then dealing with the best estimate shown on exhibit 85 (the Gerard model for Feburary 17th) said that at apoint 120 km downstream and going up the concentration gradient to a point 500 metres from the outflow, the concentration becomes .2 ppm (200 ppb) and one falls within the sublethal effects range, and that at 100 metres from the outflow, you would have a concentration of .4 ppm which is in the middle of the sublethal effects range. This sublethal concentration would then continue to increase to within a few metres of the outflow pipe where normally lethality would be expected if a fish was there. With respect to the March 9th "oil and grease" reading, (exhibit 86) the model shows the situation to be somewhat more serious, in that 120 km downstream the concentration would be .12 ppm. Dr. Vandermuelen suggests that as being an environment rich for tainting and as you then progress up the concentration gradient to 500 metres from the outfall, the concentration would be .4 milligrams per litre, where sublethal effects are expected. Notably, Dr. Vandermuelen described this concentration at 500 metres from the outflow pipe by saying that "if a fish was sitting in the plume for 96 hours it would not be very healthy".

It then appears that at 100 metres from the outflow pipe the concentration would increase further and the fish would be experiencing considerable difficulty as you proceed further towards the outflow pipe and possible lethality. It is not my intention to pinpoint when and where sublethal effects would occur, particularly in view of Dr. Vandermuelen's references to ranges as opposed to absolutes, but it is apparent that in each of the situations herein, namely, February 17th and March 9th, 1982 that within several hundred metres from the outfall, fish swimming in the plume would be experiencing sublethal effects which would be deleterious. It is, moreover, notable that depuration is predicated upon having the organism placed in "clean water" as opposed to water that is consistently being injected with hydrocarbons, such as the situation herein where the mass discharges into the river were far in excess of what were allowed by licence. I was unable on the evidence to conclude that the water proceeding through the "cooling water loop" was uncontaminated, or the volume of same, but nevertheless, if there was any dilution from this source my understanding from Dr. Gerard's evidence was that the only area that would be affected on the models would be the "near field" concentrations wihtin no more than 40 metres from the outfall pipe, and thereafter all other concentrations would remain the same. Therefore, there is still an area in each case of several hundred metres from the borderline of sublethal effects, up the concentration gradient toward the source of the effluent being the outfall pipe, within which fish are likely to experience sublethal effects.

The defence of due diligence has been rejected and as I am satisfied beyond a reasonable doubt that the "oil and grease" deposits made by Suncor into the Athabasca River on February 17th and March 9th, 1982 degraded or altered the quality of water in the Athabasca River so that it was likely to be deleterious to fish or fish habitat or to the use by man of fish that frequent the water I find the defendant guilty of the charges.

(Editors Note: The Court levied a total fine of $30,000.; $15,000. for each count).

BRITISH COLUMBIA PROVINCIAL COURT

R. v. PETERS

FRIESEN, Prov. Ct. J. Clearbrook, November 14, 1986

***Fisheries Act*, R.S.C. 1970, c.F-14 as amended - Accused pleaded guilty to two counts under section 33(2) - Depositing a deleterious substance into water frequented by fish - Pig manure into Nathan Creek.**

Sentencing - Mitigating factor - Demonstrated responsibility - Total fine of $250.00 levied - Section 33(7) order to refrain from further depositing.

The accused pleaded guilty to two counts under section 33(2) of the *Fisheries Act*, R.S.C. 1970 c-F.14 as amended, depositing a deleterious substance into water frequented by fish.

The court held that the accused acted responsibly as soon as the problem was brought to his attention. Further, it was not a case where the accused deliberately dumped the material into the creek without any concern for the habitat, so a fine was levied in the lower range.

A fine of $250. was levied and a section 33(7) order was imposed refraining the accused from depositing or from permitting the deposit of a deleterious material into Nathan Creek.

T. Sperling, for the Crown.
D. Lester, for the Accused.

FRIESEN, Prov. Ct. J.

I think I'll comment generally on the perception I have of this case. He's plead guilty to these two charges and there is a clear violation of the *Fisheries Act*. Mr. Peters is from a different part of the world where he's not familiar with the extremely high rain fall that we can get over a short period of time and which can cause flooding and spillages from depressions which collect these kinds of deleterious materials on a farm.

I'm taking into account that he has tried to be as responsible as he should have been as soon as the problem was brought to his attention. Fortunately it's not a case where he has deliberately dumped this damaging material into the creek without any concern for the habitat, so a fine in the lower range is justified for that reason.

The amount of the fine I'm fixing is (sic) two hundred and fifty dollars on each count, for a total of five hundred dollars. That is a modest fine, but it reflects the view I take that he's basically a responsible person and along with an injunction which will guarantee the safety of the fish in the creek in the future, it will act as a deterrent to others. Default is fourteen days. I'll give you time to pay the fine. And pursuant to section 33 subsection 7 of the *Fisheries Act* and Regulations, I'm ordering that you refrain from depositing or permitting the deposit -- or from permitting the deposit of a deleterious material into Nathan Creek or into any drainage system that would allow such a deleterious material to enter into Nathan Creek from your farming operation.

MR. SPERLING

I wonder Your Honour, if that might specifically say pig manure.

FRIESEN, Prov. Ct. J.

Well yes, it's intended to be pig manure. I don't mind saying that. Sometimes it's the deleterious material that comes from the pig manure. It may just be chemicals that finally get to the creek.

BRITISH COLUMBIA PROVINCIAL COURT

R.v. TUFCOAT SEALCOATING LTD.

PARADIS, Prov. Ct. J. Vancouver, October 28, 1986

***Fisheries Act*, R.S.C. 1970, c.F-14, as amended - Accused found guilty under section 33(2) - Depositing a deleterious substance into water frequented by fish.**

Sentencing - Factors considered - Pre-existence of warning - Actual instructions given to employees to dump - Fine of $1500.00 levied.

The accused was charged with violating section 33(2) of the *Fisheries Act*, R.S.C. 1970, c.F 14 as amended. The accused operates a business where driveways are coated with a substance called Jetseal. In the course of this particular job, approximately five gallons of excess Jetseal was dumped into a storm sewer and found its way into the MacKay Creek, a spawning stream for fish. Relatively few fish were killed.

Held, the Court found the accused guilty.

The Court held that the company was not exercising the kind of care that it said that it would exercise when it was previously warned about the damage that could be caused by this substance. Further, in spite of the warning, the actual instructions given to the employees were to dump the excess they may have down the storm sewers.

The Court levied a fine of $1500. The Court made the observation that there is every likelihood that a more substantial penalty would be imposed should anything of this nature occur again with regard to this defendant.

K. GILLETT, for the Crown.
L. JENSEN, for the Accused.

PARADIS, Prov. Ct. J.

The Defendant Company is charged with depositing a deleterious substance in a stream, which is in fact a spawning stream for fish, MacKay Creek. The simple facts are that that Company operates a coating business, that is, a business through which driveways are coated with a particular substance called Jetseal. In the course of this particular job, which was done close by the stream approximately five gallons of excess Jetseal was dumped into a storm sewer, which found its way immediately into the creek and there was a relatively minor fish kill.

The Crown has put before me several previous decisions indicating the range of fines for this type of offence and I am familiar with them and I can say at the outset that they involved -- all but one involved a greater dumping of waste and also greater damage caused as a result.

The Crown also indicates to the Court that in February of 1985 the same company received a letter warning it to exercise more care in the use of this particular sealant when, apparently, some environmental damage was done in the Municipality of Coquitlam.

From that time, Counsel for the Defendant Company advises that the Company has instructed its employees to dump or rather to keep Jetseal in some large drums that they have on the truck and not to dump it; but that indeed when they have some excess in the buckets that they use, the equipment that they use, then those are dumped and the equipment rinsed out down storm sewers.

The two difficulties I have with this situation are these: first of all, the pre-existence of some warning about the damage that could be caused by this substance; and secondly, in spite of that warning, the actual instructions given to employees are to dump the excess they may have down the storm sewers. That, I think is enough to satisfy me that the Company was not exercising the kind of care that it said it would exercise when it was warned in 1985. It did something, but it appears to me it did something without really understanding or attempting to understand the true nature of the danger being posed by this substance. It would seem to me that after that kind of warning, every attempt would be made to find a single, particular safe site at which the excess from any job conducted on any given day or during any given week could be dumped.

BRITISH COLUMBIA PROVINCIAL COURT

R.v. WESTERN PULP LIMITED PARTNERSHIP

WALKER, Prov. Ct. J. Squamish, February 27, 1987

***Fisheries Act*, *R.S.C.* 1970, c.F-14 as amended - Accused found guilty of offence under Section 33(2), depositing a deleterious substance into water frequented by fish - "Bunker oil" pumped into Howe Sound - Due diligence defence unsuccessful.**

The accused was charged with violating section 33(2) of the *Fisheries Act, R.S.C.* 1970, c.F-14 as amended, depositing a deleterious substance into water frequented by fish. During the morning of March 20, 1986, a hose, operated automatically by a sump pump, pumped a quantity of oil into a sewer. The oil eventually found its way into Howe Sound. The reasons for this occurrence, were not determined completely, however the court found that an employee had removed the hose from an Oil Pump Area, to pump out rainwater into the nearby sewer. The same hose was normally used to pump oil into barrels, also stored near the sewer drain. The Court concluded that it was unclear who started the hose and when it was started, who first noticed it running, what action was thereupon taken, and how much oil was pumped into the sewer.

Evidence relied upon by the crown included samples of oil like material collected from various locations in Howe Sound, samples of oil and absorbent material collected from the floor of the company's powerhouse building and photographs of an oil coating spread over a number of rocks and pilings.

Held, the Court found the accused guilty.

The Court was satisfied that the samples of oil collected and relied upon by the Crown were part of the substance discharged on March 20 and that it was in fact a deleterious substance, as defined under the provisions of the *Fisheries Act*.

The Court also found that the waters of Howe Sound are waters inhabited by fish.

The Court held that the defense of due diligence had not been established, having regard to the apparent lack of a clear policy with respect to the operation of the hose, and the failure of the company to install a safety device whereby the difference between oil and water could be detected. Further, in the event that oil found its way into the sewer pipes, the sump pump could not be turned off.

V.D.R. WILSON, for the Crown.
G.R. SWITZER, for the Accused.

WALKER, Prov. Ct. J.

Western Pulp Limited Partnership, operators of the Woodfibre Mill, have been charged with a violation under S.33(2) of the *Fisheries Act*, - that they did deposit or permit the deposit of a deleterious substance in water frequented by fish.

The Crown called as its witnesses Albert Ionson and Henry Ragetli, local Fisheries Officers, Keith Hebron, Head of Emergency Operations, Environment Canada, John Englar, a Chemist with the Department of Fisheries and Oceans, and Stephen Pond, a biologist with the Department of Environmental Services, Richard Kormendy, Power and Recovery Supervisor, Thomas Howells, 4th Class Engineer, and Doug MacKenzie, 3rd Class Engineer and Senior Operator. In addition was filed a statement of Gordon McLeod, a Maintenance and 3rd Class Engineer, who was unable to attend on account of illness.

The Defendant called no witnesses.

On shift at the old powerhouse at Woodfibre on March 19th and 20th was a four man crew, consisting of Kormendy, as Supervisor, MacKenzie, as Senior Operator, MacLeod, as maintenance operator, and Howells as Junior Operator. The shift was described by the operators as busy and confusing, due to a changeover to a new plant.

It appears that at some stage in the early morning of the 20th, a hose was turned on, operated by a sump pump contained in what has been described as the "Oil Pump Area", (all of which is contained in the Powerhouse Building, shown in a book of Drawings and Photographs entered as Exhibit 5, and more specifically outlined on Drawing 3). The purpose of this pump and hose was two-fold; to pump into a nearby sewer outlet rain-water from the open Oil Pump Area, and to pump from the same area oil into barrels, also stored near the sewer drain. For reasons not entirely clear the hose pumped a quantity of oil into the sewer, which oil eventually found its way into Howe Sound.

Mr. Rempel became aware of the spill at 13:00 March 20, and reported it to the proper official at Environment Canada, prompting the investigation which has been described by the officers.

Having examined with some care the evidence of the four employees on shift and the conclusions of Mr. Rempel, which are basically the summary of his internal investigations, I am unable to determine with any certainty what happened to cause the oil spill. While it appears clear that MacKenzie removed the hose from the Oil Pump Area, to remove water, it is unclear who started the hose, when it was started, who first noticed it running, what action was thereupon taken, and how much oil was pumped into the sewer. There is also some uncertainty as to what type of oil was discharged.

Fisheries Officers Ionson and Ragetli testified that on March 20, following the oil spill complaint, they attended Woodfibre. They described seeing a sheen of oil near the docks, which Ionson described as "black globules of oil", the coating being widely spread over rocks and pilings. Ragetli took a sample of this black oil-like material under the docks of Woodfibre, entered as Exhibit 2.

They crossed Howe Sound to Watts Creek, 1 km north of Darrell Bay, and saw the same sheen. Ragetli removed a sample from this location, entered as Exhibit 3.

Much later (on April 1) Ionson took a sample of oil and absorbent material from the floor of the Powerhouse building. (Exhibit 4).

On March 21 Ragetli returned to Woodfibre with Hebron and Phillips, officials from the Department of Environment. They talked with staff members from the Mill, and learned the means by which the oil entered Howe Sound. A series of photographs were taken by Ragetli and Hebron which make up the photograph section of Exhibit 5.

Hebron testified that it was his responsibility to attend spills of oil and chemicals throughout the Province, and to ascertain that the area is cleaned up to acceptable standards. He stated that in his twelve years of service he has been involved in approximately 500 responses, and 200 clean-up operations. He testified that he estimated, while in consultation with Rempel, and upon examining the site, that there was a spill in the neighbourhood of 500 gallons. He further testified that the Defendant Company was most cooperative throughout this operation.

The next occurrence chronologically was the clean-up operation on March 22 & 23. This was dealt with in the evidence of Mr. Rempel, who supervised this activity. Rempel stated that the clean-up cost the Defendant over $20,000, largely labour and rental of a tug. Photograph 23, shows a bit of this work.

Mr. Rempel also filed [illegible] Exhibit 6 a Contingency Plan dated May 1982 concerning industrial emergencies. Little reference was made to this Exhibit throughout the case.

He further stated that the present Power Plant no longer used the area we have been concerned with here.

John Englar, a Chemist from the Department of Fisheries and Oceans, analyzed Exhibits 2, 3, & 4, on April 3rd and 4th.

He was ruled an Expert witness in the area of analysis of the substances which formed these exhibits, and the likelihood of them being of common origin.

Mr. Englar stated that in his opinion the clear and black floating substances forming Exhibit 2 & 3 were hydrocarbons. There was a strong likelihood they were from a common source.

As for the oily material forming part of Exhibit 4, he was of the opinion they were made up from two substances: weathered diesel fuel, and weathered gasoline.

Englar stated the basic material here was a diesel fuel.

The final episode pertaining to this case which I have heard about is the dye test conducted by Fisheries Officers Ionson and Ragetli on August 28th. It is unnecessary to review this evidence, except to state that it explains clearly the progress of liquid entering the sewer to the outlet into Howe Sound.

Stephen Pond, a Biologist with the Department of Environment, testified that diesel fuel was a substance which is deleterious to fish and shellfish. It would also harm plants in the affected water, which would in turn result in damage to the fish.

The two Fisheries Officers described in some detail the animals and plants found in the Howe Sound area at Woodfibre and Darrell Bay.

The foregoing is a brief summary of some of the facts pertaining to this case.

There are three basic issues which must be determined before the Court can establish whether or not guilt beyond a reasonable doubt has been proved.

1. It must be determined whether the substance discharged on the date in question was a deleterious substance so as to comply with S.33(2) of the *Fisheries Act*.

2. It must be determined whether the water where this substance was deposited was frequented by fish.

3. This being, by agreement, a charge of strict liability, it must be determined whether the Defendant has exercised due diligence in the carrying out of its operations.

Firstly it must be determined whether the substance discharged on March 20th was in part the substance observed and gathered by Fisheries Officers Ionson and Ragetli, upon their subsequent investigations, and whether it was a deleterious substance. There exists the obvious discrepancy between the evidence of the Company employees, who suggest that the escaping liquid was Bunker fuel, and that of the Crown employees who suggest that the substance was diesel fuel.

I am in agreement with the submission made by Defence Counsel to the effect that the fact of the clean-up at a cost to the Defendant of over $20,000 does not in itself prove a spill of a deleterious substance, although I do believe that it is one factor to be taken into consideration.

I would state at the outset that there is insufficient evidence to link the contents of Exhibit 4, taken a week after the spill, with this case.

What was the substance discharged?

Mr. Rempel described the substance as Bunker Fuel No. 6, used in their powerhouse. He stated diesel fuel was much lighter.

Kormendy described the substance as Bunker "C" oil. He stated that diesel fuel was used in the starting up and shutting down of the boilers, but that one of this substance was going through the system at that time. Kormendy further testified that there might have been diesel fuel used before his shift.

MacKenzie identified the fuel as Bunker C oil.

I am satisfied and so find that the samples gathered as Exhibit 2 & 3, and the substance observed by the Fisheries Officers Ionson and Ragetli were in fact part of the substance discharged on March 20th. Mr. Rempel himself stated that upon investigation there could have been 500 to 1000 gallons discharged. The discharge was apparently a highly unusual occurrence, and Ragetli, who stated he had never seen oil floating on the water in that quantity previously.

He described vividly the oil which was spread on the rocks and was covering the pilings on the pier.

Crown Counsel has suggested that the connection between diesel fuel and Bunker C oil hasn't been shown, and I may assume that the lighter diesel can be derived from the heavier Bunker C Fuel. In the absence of specific evidence which is clearly of a technical nature, I am not in a position to make that assumption.

I do find, however, that the substance which was flowing from the Oil Pump area into the sewer and from there into Howe Sound, is the substance observed by Fisheries Officer Ionson and Ragetli, that it is the substance which formed part of Exhibits 2 & 3, that it is part of the layer of oil cleaned up by the Defendant on March 22 & 23, that it is the substance shown in photographs 19, 20, 21, 22, 24, & 25 taken by Mr. Hebron, that it is the substance observed by Mr. Hebron, and that it is the substance described by Mr. Englar (from Exhibit 2 & 3) as a hydrocarbon with diesel fuel as its main component.

If further find that this substance described by the foregoing witness was a deleterious substance. I make this finding specifically having regard to the evidence of Mr. Pond, the Biologist.

In making these findings, I am not unmindful of evidence of the Company Employees concerning the likelihood of the discharged fuel being Bunker C Fuel. However the evidence which I have reviewed leads me to the conclusion that whatever escaped from the Woodfibre plant was that which was seen, collected and analyzed as diesel fuel, and that it is in fact a deleterious substance, so as to comply with the provisions of the *Fisheries Act*.

The evidence of Fisheries Officers Ionson and Ragetli, corroborated by that of Mr. Pond, must lead me to the inevitable conclusion that the waters of Howe Sound and more particularly those waters and Woodfibre and Darrell Bay are frequented by fish. We have heard that inhabiting these waters are various species of shellfish, ground fish, migrating fish at different stages of their life cycles as well as plants sufficient to satisfy the definition section in Section 2 of the *Fisheries Act*.

The remaining issue to be decided is whether for this charge being an offence of strict liability, the defence of due diligence or reasonable care has been established. The guidelines were set forth by Dickson, J. on pages 52-54 of *Regina v. Sault Ste. Marie* (1975) 3 C.R.(3d) page 30.

1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed or by additional evidence.

2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

The question of what constitutes due diligence is dealt with extensively in *Regina v. Gulf of Georgia Towing Co. Ltd.* (1979) 10 B.C.L.R. p. 134 B.C.C.A. That case, involving an oil spill, is similar to the case at bar.

Seaton, J.A. on p. 137 explains the Courts view on what might constitute due diligence:

> To test the suggested error of law, I would suggest this: that due diligence under the circumstances here might include specific written instructions, maybe locking devices for other valves, possible alarm systems. But in the end I am of the view that the trial judge decided - and rightly decided - that this company did not make adequate provisions in its systems or otherwise to prevent a spill caused by a valve being open that should not have been open. I think that the length that the employer must go to will depend on all the circumstances including the magnitude of the damage that will be done in the event of a mistake and the likelihood of there being a mistake. For fuel barges, if one does nothing but hire careful people, train them carefully and tell them not to leave valves open, inevitably a valve will be left open. I am sure they have not hired infallible people. There will inevitably then be a spill. It seems to me that the consequences are so serious that something will have to be devised by the company if it is to be protected here to prevent spills when employees are not as careful as they are told to be.

In the case at bar we are concerned with whether the system in place in the power plant at Woodfibre was one which contained adequate precautions to avoid the oil spill which we have heard took place.

It is clear that the personnel on shift were highly trained and on the night in question extremely busy, concerning themselves with the changeover to the new plant.

It is further clear that the hose, left outside of the oil pump area, was turned on by a person unknown to me, causing the resultant spill.

Mr. MacKenzie, an employee of 23 years, who testified that he tried to start the pump, and that he left the hose unattended, stated with certainty and considerable impact, that the hose was normally left in the sewer, and that it was frequently left unattended even if being operated. He described the impossibility when it was being used to remove rainwater, of having an operator manning it for a twelve hour shift.

His testimony is in direct conflict with that of Mr. Rempel and Mr. Kormendy, who stated that the hose must be attended when being used, Kormendy stated there was no policy with respect to the resting place of the unused hose, but that he usually threw it into the oil pump area when it was not being used. He stated that it was a good practice to leave it in this area and it was very uncommon for someone to leave it outside of the oil pump area.

While Kormendy and MacKenzie cannot exactly be described as objective witnesses, there being the inevitable questions of the possibility of negligence on their parts, I am of the opinion that their respective expressions of policy and safe practice which appeared to me to be sincere, lead me to the conclusion that there was no fixed policy on the housing and operation of this sump pump hose. It is my view that a potential danger existed here, there being a possible link between vast quantities of oil and the waters of Howe Sound. It is my view that employees of the company should have foreseen this potential danger and established a clear policy, preferably in writing, concerning where the hose was to be kept, and how it was to be operated. It is clear from the evidence of the employees that they had different perception of what good operating practices were. Such a policy might have avoided the consequences of the hereindescribed oil spill, which was of a considerable magnitude, as contemplated in the *Regina v. Gulf of Georgia Towing Co. Ltd.* decision.

I would similarly conclude that the Company through its employees, in realizing that the hose pumped both oil and water; water into the waters of Howe Sound, and oil into barrels, would have contemplated an error such as in fact occurred here and would have developed some device within the sewer system whereby the difference between oil and water would be detected, and in the event that oil found its way into the sewer pipes the sump pump would be turned off.

Having regard to the apparent lack of a clear policy, and the failure of the Company to install such a safety device, it is my finding that the Company has not exercised due diligence in operating this part of the enterprise. That is to say, it did not take all reasonable steps to avoid the particular event. It was a potentially dangerous situation to the reasonable man.

There is no suggestion that there existed a belief in a mistaken set of facts, so as to rely upon the first half of the defence, and render the act or omission innocent.

This defence of due diligence is not therefore established.

I am satisfied that all essential ingredients of the charge have been proven and I find the Defendant guilty as charged.

SUPREME COURT OF CANADA

R.v. WESTERN STEVEDORING COMPANY LTD.

ESTEY, McINTYRE, LAMAR Ottawa, May 7, 1984

Fisheries Act, R.S.C. **1970, c.F-14 as amended - Accused convicted by Provincial Court Judge - County Court Judge sets aside conviction and orders new trial - Court of Appeal allows Crown's appeal and restores conviction - Provincial Court Judge did not err in finding the deleterious substance had been deposited in a place under conditions where it may enter water frequented by fish - Leave to appeal to the Supreme Court of Canada refused.**

Appeal by Crown to British Columbia Court of Appeal at 3 Fisheries Pollution Reports 487.

Editor: Accused refused leave to appeal by Supreme Court.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. WESTMIN RESOURCES LTD.

DAVIES, J. Campbell River, August 1, 1985

***Fisheries Act*, R.S.C. 1970, c.F-14 as amended - Accused found guilty of offence under section 33(2), depositing a deleterious substance into water frequented by fish - Metal effluent into Myra Creek and Buttle Lake.**

Sentencing - Mitigating factor -Rehabilitative efforts made by corporation in late 1981/82 - Indifference and neglect prior to and during the first five months of 1981 considered - $80,000.00 fine levied.

The accused was charged with four counts of violating section 33(2) of the *Fisheries Act*, R.S.C. 1970, c.F.-14 as amended. The accused owns a mining operation where base metals are separated from tailings through a metallurgical process that includes the discharge of treated effluent into the Myra Creek and Buttle Lake. The operation had been in existence for a number of years prior to the laying of the four charges.

The evidence relied upon by the Crown primarily consisted of the results from two tests performed in January and May 1981. In the January test half of the fish placed in the effluent died while in the May test all of them died. In both tests, the control fish, that is, the fish which were in uncontaminated water, were not affected and survived.

Held, the Court found the accused guilty.

While the Defence satisfied the Court that there are other more precise but expensive methods of analysis, (i.e. the "flow-through analysis"), a Crown expert's testimony was accepted. Dr. Alderdice tesfitied that the sampling and the testing of effluent and the conduct of the biopsy tests was done in a reasonable manner although the methods could be improved. Further, he testified that such tests were reliable.

The Court held that in passing sentence a Judge is required to consider "the protection of society, a deterrent to the accused and to others and where it is a person rather than a corporate entity, the rehabilitation of that person." Corporate rehabilitation where applicable is also a factor that should be considered.

The Court considered the great steps that had been taken by the corporation since late 1981 to address the rising metal level in Buttle Lake, through the installation of a pollution abatement system at an approximate cost of 14,000,000. However, the corporations' years of indifference and neglect prior to and during the first five months of 1981, prompted the Court to levy a fine of 20,000. on each count.

T.J. Bishop, for the Crown
Jon F. Tollestrup, for the Defence

DAVIES, Prov. Ct. J.

As a preamble, I have heard evidence in this matter earlier this year, on June 24th, 25th, 26th and 27th, and at the conclusion of the hearing requested that a transcript be prepared so that I could properly and hopefully with some leisure consider the extensive evidence prepared by both Counsel. That was done with the appreciated co-operation of the recording staff here in Campbell River. However, the pressure of work was such that I received the final volume yesterday and refrained from finalizing a decision until I had read all of it, feeling that it would be grossly unfair to do otherwise. That is my reason, gentlemen, why I will not be giving written Reasons for Judgment today but will be giving a decision but it will be oral, and as the end of it I will invite either Counsel to ask me to give any further reasons that they feel will be of assistance for Appellate purposes because one of your is, obviously, not going to be happy with my decision, which is a factor in all court cases.

Now, in the matter of Westmin Resources Limited formely known as Western Mines Limited, the trial before me is by way of a re-trial pursuant to the order of the Honourable -- the Court of Appeal of British Columbia. The previous hearing before a brother judge was determined not on the merits of the issues but on a technicality which technicality was upheld by a County court and overruled by the Court of Appeal that ordered this new trial. I mention that as a reason for the long delay between the evidence which was heard in 1981 and the hearing in 1985.

I've been assisted in this matter by learned Counsel Mr. Tollestrup and Mr. Bishop who have conducted themselves in a manner that I consider worthy of comment. It was exemplary. The over-all competent courtesy displayed to each other and to the Court was appreciated. Certain admissions were made to avoid necessity of proof -- certain elements, and that again is appreciated.

The accused entity named as Westmin Resources Limited formerly known as Western Mines Limited is charged on four counts, identical save and except for the date. The first, count one alleged that on or about the 28th day of January, A.D., 1981, at or near Campbell River, British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance in water frequented by fish or in a place under conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter such water CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED.

Count 2 alleges identical conduct on the 24th day of February 1981.
Count 3 on the 1st day of March 1981 and
Count 4 on or about the 3rd day of May 1981.

The corporate entity had pursuant to Companies Act changed its name at the relevant period of time and that change of name was in part the reasons for a re-trial it made necessary because of decisions as to whether or not service on the proper entity had been made and whether or not it was necessary. That is no longer before me. It has been resolved and I am required to reach a decision on the merits.

The corporate entity, a mining and milling operation with head offices in Calgary, Alberta, operates a mine and mill and has for many years, some 60 miles from Campbell River on Vancouver Island -- ore removed from underground workings and the effluent in question, its water and elements from the mine and not from the mill. This effluent was directed from the mine entrance or exit into a series of settling ponds so that hopefully heavy metals including zinc might settle on the bottom and only uncontaminated water be returned to nature. An overflow was built into one of these ponds. They were intended to direct and release excess water over capacity into nearby Myra Creek. Myra Creek flows into Buttle Lake headwaters of the Campbell River system which eventually disgorges into Discovery Passage. Such waters, are by admission, waters frequented by fish within the meaning of Section 33 of the Fisheries Act.

On each of the dates in question samples of effluent were taken interalia from a point just par to the effluent stream entering into Myra Creek. Samples were taken elsewhere for comparison purposes. Samples were taken o.. the date of the first alleged offence and the last one for biopsy purposes. I heard from Mr. Marken, a Fisheries officer with the Department of Fisheries and Oceans who told me that on January the 28th of 1981 he investigated the outfall from the settling pond at Myra Creek and described the path taken by mine water effluent. He also indicated existence of a mill, a crusher and concentration but I understood that effluent from such concentration does not form part of the effluent in the settling ponds in question. Pictures were taken that date by himself and marked as Exhibit 4 herein. They grapically indicate the contrast between the natural water upstream and the polluted water downstream.

The same technique of sampling was used by Mr. Marken and others on each of the dates of the alleged offences.

I was told by Dr. Alderdice, called as a witness for the Crown, that the sampling and the testing of effluent and the conduct of the biopsy tests was done in a reasonable manner although the methods could be improved.

A total of 40 fish were tested: 20 in each test, the first in the January 1981 effluent and then in the May effluent. In both of those tests all the control fishes, that is, fish which were in water uncontaminated, were not affected and survived. In the January test, a half of the fish tested in the effluent died. In the May, all of them died. This is what is called a static test. I stress that because learned Counsel for the Defence repeatedly made reference to the flow-through test referred to in the *1977 Metal Mining Liquid Effluent Guidelines*. Those Guidelines are, in effect, governing the conduct of mine operations, and the manner in which they should test effluence to be sure that the pollutant do not adversely affect the fish.

It was stressed that guidelines are not law -- they're merely recommendations to a mining corporate entity as to how they should protect themselves from action and how they should comply as corporate citizens with the requirements of protecting the environment.

The flow-through test is vastly more expensive and is, from the evidence that I have heard and accept from witnesses from both sides, more definitive and I presume would be of greater assistance to anybody who wanted to take action to stop a certain element from being a hazard.

Now, the manner which one test should be done, as far as I can see in logic, is not relevant to how a different type of test should be done. And as a great deal of time was spent on this matter by learned Counsel for the Defence and he extensively cross-examined, I must say that Defence has satisfied me that there are other more expensive and precise methods of analysis, namely, a flow-through analysis as opposed to the static method used. For example, in testing for waters intended to be used in the fish hatchery where it would be essential that the purity be of the highest standards, such tests might well be essential to protect the fish therein, and as one test, which would indicate that the water was pure, might be inaccurate, replicate tests would be advised and might be essential to assure the safety of the fish in such a program.

Now, on that point, Dr. Alderdice satisfied me that for the purposes of determining whether or not the effluent in which the tests were done here was tested adequately, his opinion was that such tests were reliable for such purposes. The matter of stress on fish and such circumstances, in his opinion, while it would be there, it would be so slight as to not be of significant factor. Throughout it was urged upon me by learned Counsel for the Defence that only the results of samples taken on the four days in question should be considered, and I find considerable merit in his position, and generally I have followed him. I am, however concerned about another aspect, and that is the evidence of a witness, Dr. McLeay, called by the Defence. He told me words to the effect that in June of 1981 -- one month after the final test by the Crown — he, at the request of the corporate entity did test effluent from the same ponds. He said that in the interval certain changes had been made and I am going to refer now to page 39 and 40 of Volume IV of the evidence heard on the 27th of June, 1985 and at page 39, line 11, certain questions in re-cross examination were put to Dr. McLeay by Mr. Bishop:

Q: Dr. McLeay, it's now come out that you've examined that particular effluent stream. Did you use test fluid of any kind including bioassays?

A: ...I'm not stalling. I'm actually seriously trying to --

Q: No no. Take your time. Think about the answer.

A: — to recall....I just can't recall, I'm sorry.

Q: You can't recall whether you did any testing of the effluent? Or, well we're calling it an effluent -- the discharge from the Lynx settling ponds?

A: ...I have done some tests of the Lynx pond water. I am not sure of the exact sampling locations --

Q: All right

A: — and that's why I'm having difficulty in responding to that.

Q: All right. When were those done — those tests?

A: They were done in June 1981 as I recall.

Q: All right.

A: I may be --

Q: Shortly after -- shortly after the sampling was done that was -- we've heard the evidence about.

A: — It was — well I'd like to qualify that though.

Q: Yes.

A: I know for a fact, Your Honour, that they were done after some major changes were made to the system. There were two modifications to the Lynx pond system, very close to the time of my studies, and before my studies. One was the introduction of lime to the treatment system and the second was the introduction of a substance called the alkaline chlorination effluent into the system.

DAVIES, J:

Could you tell me what effect either of those would have?

A: Ahm...well the lime was introduced, I believe, as a requirement by the Provincial Goverment - Ministry of the Environment with the intent of precipitating out any metals in solution, or for reducing the dissolved metal concentration. It is a -- lime is very commonly used for that purpose.

As to the alkaline chlorination effluent, it's my understanding that it previously discharged to Buttle Lake via a separate line -- a separate pipeline -- and the Ministry of the Environment instructed Westmin Resources Limited to rechannel that into the Lynx pond system. And I'm not aware of the reason for that diversion of flow. But it was -- it is a material that is -- it's a waste water that results during the processing of some of the ore and I believe cyanide is involved in the production method. So it is -- this material generated and ...

DAVIES, J:

Thank you.

MR. BISHOP:

Q: Who were you employed by at that time? Were you still at B.C. Research at the time you did those tests or had you set up your own consulting firm at that time?

A: I was still at B.C. Research. I set up my own consulting firm in October 1981.

And I now have read that to put things into context.

Q: All right. Those tests you did, did you do them at the request of Westmin Resources? Or was it -- was B.C. Research asked to do this by someone else?

A: Westmin Resources Limited.

Q: All right. What was the results of those tests as far as whether the -- you found the liquid in those settling pounds to be deleterious to fish?

A: I can honestly not recall what the results were. I do so many tests that it's not clear in my mind.

Q: All right. I have one more question: You were hired by Westmin Resources to come and assist at this trial, is that correct?

A: That's correct.

Now, those questions and answers were made in re-cross examination. Mr. Bishop opened the door for Mr. McLeay that might not have been opened for him in direct examination because it was of tests taken afterwards. However, it also gave Mr. McLeay an excellent opportunity to tell me, if he could, that those tests were satisfactory and there was now no problem that he could tell after his extensive tests. Well, I'm having difficulty with accepting that at its face value except for the purpose of drawing some conclusions. I find it difficult to accept that a Defense witness of Dr. McLeay's obvious competence, who took tests of the impugned system, within one month would have forgotten the results to those tests by himself on that effluent. It would be such a golden opportunity for him to have put in, 'Yes I did and it was perfect,' if he could, and honestly, do so. I'm satisfied that his honesty stopped him from doing that. I can only conclude that those tests would have tended to corroborate the evidence adduced by the Crown.

Now, the Defence in urging consideration of the Guidelines in 1977 also at the same time agreed that under certain sections of this Act -- the Fisheries Act -- the definition of deleterious substances would not be applicable and therefore, if zinc is in fact deleterious to fish, it would have to be established by the Crown.

As I stated earlier, I'm satisfied that those Guidelines are just that: to guide a mine in how to stay out of trouble and not to limit the manner in which the Fisheries officers should determine whether or not an offence has been committed.

I had, and permitted, extensive discussion of those Guidelines because, until the case was closed, I felt I might have raised the defence of due diligence that, inasmuch as there had been compliance with the Guidelines, they had done all possible to avoid contaminating the system. That was never suggested. Due diligence was never raised and I commend, on the circumstances before me, on the evidence before me, it couldn't be raised because there was none. It would have had to be new evidence that is not before me -- that's pure speculation.

I heard evidence, in fact, to the contrary form due diligence. The manager of the corporate entity -- or an officer of the corporate entity -- was called and stated that the system has been carrying on as long as the mine has been in existence.

Now, I've paid attention specifically to the exhibits that have been filed. I have read every one of the some 352, I believe, pages of the transcript. I do apologize to learned Counsel for the absence of written reasons but as I stated earlier, I just finished reading those at midnight, having received the last few pages at 11:30, and then had to start doing what I'm doing now. I thought it vastly more desirable that I not seek any further adjournments. And I'm not.

Now, the Defence has satisfied me that only certain elements, those which are capable of ionized -- of being adapted into the fishes' system -- are deleterious to them -- to the fisheries. In other words, a metal which cannot be absorbed into their system isn't going to hurt them. However, on the tests before me, I'm satisfied that whatever elements were in that water, whether it was zinc, copper or any of the other trace elements, killed fish. The substance doesn't have to kill a fish in order to be deleterious.

It can be deleterious to them if it adversely affects their welfare and wellbeing. But on each of the dates alleged, in the opinion of Dr. Alderdice, which opinion I'm accepting, the contents of the effluent stream would have been lethal to fish, according to the standards they apply. And, in fact, it was lethal to 15 out of 20 fishes who, in two separate tests were put into them.

I was told by witnesses for the Defence that the containers are subject to contamination by leaching, by improper cleaning and by contamination from sources other than the effluent put therein.

I'm satisfied from the evidence of the Crown that the vials used in this case, and the containers used, were handled in a proper workmanlike manner, and while anything is possible, that there is no reasonable, rational basis to assume that there was any contamination of those containers.

I'm satisfied from the totality of the evidence that no entity other than Westmin Resources formerly known as Westmin Mines had anything to do with the disturbing of the burden, the ore, or the contents of the ground in or about Myra Creek. Even the roads there are made out of their material. I therefore consider it academic whether the substance which obviously flowed into Myra Creek in that effluence came from underground, on the ground or any part of it, it was all completely under their control, and as the Guidelines had been mentioned and as I had to consider them in eventuality of a due diligence aspect, I don't know whether they were complied with or not. If they were complied with, I would have expected in that they require a testing by the mining operation itself at least once every three months, and there's more than three months between these two tests, that I would have heard results of such a biopsy and complete test with the flow-through method done by them had it happened and had it been in their favour. The absence of such evidence which would be readily available, and by the Guidelines should be available, is not before me.

My only regret in coming to the decision I'm forced to, is my respect for learned Counsel for the Defence, and it's never pleasant for Defence Counsel when the Judge finds against him. However, it's inevitable I have to make one of you gentlemen unhappy and I'm sorry it's you, sir.

On the totality of the evidence before me, I have no doubt, based on reason, that would allow me to acquit. I'm satisfied beyond any reasonable doubt that the corporate entity on all four cases was guilty as charged, and I so find them.

As to sentence, I'll hear the Crown as soon as the Crown wishes to be heard. And I'll hear the Defence as soon as the Defence wishes to be heard, in that order. I believe you're entitled to the last word on sentencing, Counsel.

(Editors note: Proceedings were adjourned over the lunch period).

. . .

(PROCEEDINGS RECONVENED)

DAVIES, J.:

Be seated please. I'll hear you, Mr. Bishop.

MR. BISHOP:

Yes, Your Honour, on the matter of sentence in this case, the penalty section is, of course, Section 33(5) paragraph b for a first offence the accused is liable to a fine not exceeding fifty thousand dollars ($50,000.00), and this is a first offence. Westmin Resources has no prior record of any kind as far as I'm aware -- certainly not for pollution.

I would also note, Your Honour, it is open to the Court under Section 33(7) of the Act to impose duties upon the accused to correct a problem or to do work to prevent the reoccurence of a problem, but I'm going to point out, and I'm sure my friend is going to point out, that is not, apparently, necessary in this case.

I am informed, Your Honour, that Westmin Resources, at some very considerable expense, has largely corrected the problem which was the subject of this case. By doing a number of works in and about the mine they have managed to reduce the levels of heavy metals being put into Myra Creek to the point where it is, apparently, at an acceptable level as far as I am aware.

I would, and I'm sure my friend will, expand on that very considerably. He knows much more about it than I do, I'm sure, as well. But I would like to point out, Your Honour, that the corrective measures which Westmin Resources took, apparently were taken after they were charged, and I would also note, Your Honour, that according to the evidence of the manager of the mine who gave evidence in this case, this effluent was being discharged into Myra Creek since the mine had been opened so that the corrective measures they took were taken quite a number of years after the problem first occurred.

DAVIES, J.:

When was the mine opened?

MR. BISHOP:

In the 60's. I don't know.

MR. TOLLESTRUP:

Nineteen 65, I think, Your Honour.

DAVIES, J.:

Thank you.

MR. BISHOP:

I would note, as well, Your Honour, and I think this is an important point, that the -- that Myra Creek and the waters it leads into are important waters in a number of respects. Buttle Lake was, at one time, a well-known freshwater fishery. But I would also note, Your Honour, that Buttle Lake was dammed in 19... the dam, I believe, was completed in 1958, and that may have had a significant impact on the fish in that lake. But nonetheless, the metals being discharged here were going into what was, as I say, a major freshwater sports fishery. Of course, downstream from Buttle Lake and the

Strathcona dam, the waters go into the Campbell River which, at its mouth, is a salmon river, and indeed of course, there's a major hatchery on the Quinsam which is a tributary of the Campbell River and the salmon have to come up through the Campbell River to get to the hatchery -- or to get into the Quinsam at all which is itself a major salmon spawning river. I would also note, Your Honour, that the Campbell River is the source of the water supply for the town of Campbell River. So on all respects, the waters into which this heavy metal was going were waters which one might call of concern from the point of view of fisheries, from the point of view of public health and from basically any point of view one can think of with respect to this sort of offence.

I would note as well, Your Honour, that the mine is in a park -- is in a Provincial park -- and one might think therefore that great care should have been taken to avoid pollution or deleterious effects on the environment.

In the matter of penalty, Your Honour, I would note that the defendant is, at least by all reports, a large wealthy corporation.

I have a few cases to refer to, Your Honour, and I will refer them briefly. The first is the decision of the Court of Appeal in this case, and that is reported at 1985, 1 -- Western Weekly Reports. The report begins at page 30 and I'm going to refer to --

DAVIES, J.:

Just a moment please. That is the decisions of their Lordships of our Court of Appeal, Seaton, Craig and Hutcheon.

MR. BISHOP:

That's correct Your Honour.

DAVIES, J.:

I have read it.

MR. BISHOP:

I'm going to refer to a comment made by Mr. Justice Seaton at the very last -- one of the very last things that was said.

DAVIES, J.:

Yes.

MR. BISHOP:

He commented:

> "I agreed with both of my brothers. The appeal is allowed and a new trial ordered. I express the suggestion to the accused that the community as a whole considers pollution to be a very important matter."

That was the passage I wish to refer the Court to, and I would submit that that is obviously so. Pollution is a matter of concern to everybody; of particular concern to the public.

As far as previous cases dealing with this section of this *Fisheries Act*, Your Honour, as far as sentencing in previous cases I have three cases I'm going to refer to briefly. The first is a case which was entitled *The Queen v. the Corporation of the District of North Vancouver* which was decided by His Honour Judge Layton in the Provincial Court on January 11th, 1982 in North Vancouver. The facts, as I have them in a digest, are as follows:

> "Over the course of 16 months black leachate continued to enter Lynne Creek adjacent to the Premier Street landfill in North Vancouver from a wooden culvert south of the playing field. Extreme discolouration of the water of Lynne Creek was evident for a considerable distance downstream from the culvert. In addition, black leachate from the landfill was flowing down the road which borders Lynne Creek. Chemical analysis showed the toxic leachate contained levels of pollutants, ammonia, mercury, phenals and PCB's. Additionally, the dyke road used to transport heavy machinery and trucks was very muddy in places causing silt laden runoff water to be discharged into the creek. Samples of the water taken over the period of investigation showed high levels of toxicity to fish."

In that case, Your Honour, the Corporation of North Vancouver was charged with five counts and His Honour Judge Layton imposed a fine of ten thousand dollars ($10,000.00) on the first count and thirty-five hundred dollars ($3,500.00) on each of the subsequent counts. I might note, Your Honour, that the Corporation of North Vancouver apparently had no prior record for Fisheries offences.

The next case I'm going to refer to, Your Honour, is a case called The Queen against Caroline Mines, and that was a case decided by His Honour Judge Anderson in Langley in March 1984.

DAVIES, J.:

I'm sorry, the name again?

MR. BISHOP:

Caroline Mines.

DAVIES, J.:

Yes.

MR. BISHOP:

Yes. That was, as I say, Judge Anderson's case decided in Langley in March 1984. I might note, Your Honour, that that is presently under appeal to the County Court in New Westminster. However, there has been no decision on the appeal. The facts of the case are that Caroline Mines apparently operated a gold mine and mill in the Coquihalla valley east of Hope. As part of their process for extracting gold from their ore, cyanide or a cyanide compound was apparently used in the mill. Now in the mill they had a system for extracting the cyanide from the effluent before it was released from the mill, however apparently the system simply did not work and they were convicted of nine counts, each relating to discharge of this toxic effluent on a separate day, and they were fined fifteen thousand dollars ($15,000.00) on each count. I would note, Your Honour, that in that case there had apparently been a fish kill in the Coquihalla river. I should also point out that the effluent apparently discharged into a small stream which did not contain fish but that stream, in turn, went into another stream which did contain fish and that stream went into the Coquihalla River, and, as I say, there was a fish kill in the Coquihalla River.

And I would also note as Your Honour probably is well aware, the Coquihalla River is a significant fisheries river. Quite possibly not as important as the Campbell River but nonetheless a significant fisheries river.

The next case I would like to refer to, Your Honour, is a case called the *Queen v. Equity Silver Mines*. And that was decided by His Honour Judge Smythe in the Provincial Court in Smithers on June 20th, 1983. Again, there were charges under this section of the *Fisheries Act*. And the facts in that case were that apparently Equity Silver Mines had a waste rock dump and there was -- some iron compound was leaching from the waste rock dump. Now the leachate was going into a small creek that only on occasion had fish in it. Apparently on certain occasions when the water rose, this little creek would have fish in it. Nonetheless the leachate was, of course, toxic or deleterious to fish. Judge Smythe commented that even though the company had spent over a million dollars trying to correct the problem, and even though the creek into which the leachate was going was not a particularly significant fisheries body of water, that pollution was a very serious matter and he fined the company three thousand dollars ($3,000.00) -- or sorry -- four thousand dollars ($4,000.00) on each of three counts.

There are other cases of course on pollution. Those are a few that may be of assistance. The Crown's submission is that the facts in this case are somewhat similar to the facts in the Caroline Mines case in that we are dealing here with a significant level of pollution into a very significant body of water from a fisheries point of view.

As far as the effect of heavy metal effluent which was going into Myra Creek, I would note, Your Honour, that the evidence of one of the witnesses in the case was that there were trout and there were trout that were easy to trap or catch upstream from the effluent discharge but that downstream from the effluent discharge into Myra Creek there was no trout that he could locate and certainly it appeared to be suitable trout habitat so that apparently the effluent was having a very toxic impact upon the trout in the Myra Creek downstream from the effluent discharge. That's about all I have to say, Your Honour, thank you.

MR. TOLLESTRUP:

Your Honour, I'd like to have Mr. Montgomery, Vice-President of the accused corporation, give some evidence relating to sentence, if I may?

DAVIES, J.:

Certainly. Call him.

MR. TOLLESTRUP:

He's prepared a few slides that we are set up to show to the Court and expect his evidence shouldn't take more than about 10 minutes.

. . .

EXAMINATION IN CHIEF BY MR. TOLLESTRUP:

Q. Mr. Montgomery, just before we go to the slides, you are the Executive Vice-President and General Manager of the mining division of Westmin Resources Limited?

A. I am.

Q. And you have been employed by Westmin since September of 1981?

A. That's correct.

Q. And before that the bulk of your experience was with Noranda Mining Limited (Phonetic).

A. That's correct.

Q. Now would you go to the table and show the first slide please?

A. Your Honour, the slides that I'm going to use here were developed for other purposes: public information et cetera and therefore there's a lot of detail on them that I will not be using. But I am going to try to very quickly show you what has been achieved since the events in 1981 with respect to improvements in the environment.

So, very quickly, here we have the location of the mine at the south end of Buttle Lake. Buttle Lake here. I will refer to a bridge leading to Campbell River. It is located there. Here's Upper Campbell Lake; Lower Campbell Lake and Campbell River itself and Discovery Channel.

A little more detail again: the mine site here. This, Your Honour, is the area the taillings were discharged into --

. . .

MR. MONTGOMERY:

Very quickly then again, under this -- this is no longer taking place, it was changed in 1984 -- but taillings at the time of the event that's being -- were being discharged in this area of Buttle Lake on the bottom of the lake. Here is Myra Creek that we talked about, flowing through here. The mine site is up here.

Now subse . . the events that took place and were referred to in 1981 after the charges were laid, these are the ponds that were talked about. Lime was added to the water inflowing into that -- those -- ponds, and also this alkaline chlorination stream was added. And water that was coming from the mine was collected and used in the processing water in the mill.

MR. TOLLESTRUP:

Now there's a diversion channel marked at the top.

A. Well I, yes I come to that.

MR. TOLLESTRUP:

All right.

A. Sorry Jon. Following that, the Company was looking at various aspects of the operation. This is a very narrow and steep-sided valley so it was decided to put a water diversion channel in this area so that waters coming down from the higher ground here would not enter the area of the operation but would be collected and brought down here and discharged into Myra Creek away from the operation. Water on this side -- and my slide doesn't cover that area -- but it did, also was brought in above the (indiscernible) area of operation.

Also, in 1981, a study group was put together, called the Buttle Lake Study Group. Representation on that study group was from the Federal Fisheries and the Federal Environmental Protection Service, from the Provincial one individual representing those two groups, one individual representing Provincial Waste Management and Provincial Fisheries, a representative from B.C. Research Council and a consultant hired by Westmin.

MR. TOLLESTRUP:

Q. Mr. Montgomery, what was the purpose of the new lime addition system?

A. The purpose of the new lime addition system was to treat these waters and to precipitate the dissolved metals in that stream, the low of which subsequently would lower, the water being discharged, and that is the area of the discharge -- that's where those samples were taken, Your Honour, entering Myra Creek. It was a chemical process -- you would call it that -- it raised the pH of the water, made it less acidic, as it comes up to a level the zinc is precipitated.

Q. And the purpose of the alkaline chlorination system?

A. The alkaline chlorination system was just another effluent that was a strongly basic substance and assisted in adding to the precipitation of the metals. Originally it had followed the taillings line with the discharge that I showed you where the tailings were just being deposited in Buttle Lake.

If I can get -- getting back to the study group?

A. Yes, yes please.

Q. The study group was requested to study the conditions that had led to the rising metal levels in Buttle Lake that had been recorded by Waste

Management and the Provincial Fisheries. They had been sampling at that Gold River bridge that I pointed out, in the early 70's. And in the late 70's and early 80's the levels were rising in Buttle Lake. So we commissioned this group and said, 'go out and try to determine the source of these rising levels of dissolved zinc in the lake.

Q. When you say "we commissioned this group . . " who do you mean?

A. Westmin.

Q. And who paid for the study?

A. Westmin.

Q. And what was the approximate cost?

A. If I may use my notes?

MR. TOLLESTRUP:

May I lead the witness here, Your Honour?

DAVIES, J.:

Yes.

MR. TOLLESTRUP:

Q. I suggest, Mr. Montgomery, that it was about eight hundred and forty thousand dollars ($840,000.00)?

A. It was.

Q. Correct?

A. It was eight hundred and forty thousand (840,000.00). That study was a three-phase study. It was carried on over about a period of a year and a half. But in the early study they looked at the conditions in the area of the tailings in the south end of Buttle Lake, in a couple of adjacent watersheds and in the Myra Creek watershed and very briefly they came with — to the conclusion that there was a substantial quantity of dissolved metal getting into the lake from Myra Creek.

Q. And what was the conclusion as to the source of that metal?

A. Well they came up the stream then and started sampling on their way up, and as they came into this area of the creek here, they ran into substantially increased levels of dissolved zinc — right in that area.

Q. And did they trace it to a source?

A. Yes. Further research lead us to these waste dumps and a phenomenon known as bacterialogical leaching was taking place whereby bacteria were — live on acidic -- or on sulphide type rocks in the appropriate periods of the year were creating an acidic condition. The acid was attacking the small amounts of metals that were in the waste dumps. Water from precipitation and from subsurface sources was coming down through here, picking up that metal which has now been put into solution by the acids, bringing it out and it was coming up into the creek, some of it in surface but largely in almost springlike occurrence, right there in the creek.

Q. And so was a system developed to deal with that problem?

A. Yes there was. It -- these things have to be developed for each occurrence because none -- no two -- are exactly alike. And I think my next slide will show what they did. Oh no.' This next slide, Your Honour, just shows these particular ponds from which the samples were taken, the stream from the mill comes in here, the chlorine and the off-line chlorination stream have been added there; these are precipitate ponds in which the precipitation takes place, and the discharge was there.

Q. Now that's --

A. In 1981 we expanded that -- okay?

Now that again just brings us back -- it's the same slide and I don't have any further need to use that slide at the moment.

So the next step it was realized that these are -- this is the same area in which the water was coming down through these waste dumps -- we have to adjust that a little better - and a system with a buried perforated pipeline was installed in here. The purpose of that was to intercept this water coming down from the waste dump, collected at pumping station, bring it back to this area where lime was added, bring it across Myra Creek into a series of ponds here where there would be time for the metals to be precipitated, and then the discharge to the creek.

This is just a schematic slide to show what we were trying to achieve. Water coming this way to be collected in these perforated pipes. Our idea was to create a hydraulic barrier. Well below the lake or the stream level which unfortunately's off the side of this slide, we wanted to have a slight inflow from the creek, create this barrier and try and get all the water, and this is just a schematic of the method that was used to control the levels of water so that could be achieved.

When we look at it in the photograph, that manhole that I showed you the schematic of, these are the manholes along the line of the pipe. This is the pumphouse, and we were able to control the level of the water in each of these sections to achieve what we were trying to do with -- trapping of waters.

DAVIES, J.:

When were they installed?

A. That didn't get in until the -- it was done during the summer and fall of 1982 and started to operate about late October, and I'll show you some of the results of that.

Again, that's the same --

DAVIES, J.:

Before you do that, when was -- it was completed in October of '82, when was it started?

A. It -- we -- it was started in November, November/December of '82, Your Honour. There had to be some modifications made of it as after --

DAVIES, J.:

I'm sorry, you told me it was working in October of '82.

A. October. And then it was in full operations from all of -- from thereon in.

DAVIES, J.:

But when was work started on it -- commenced?

A. It was commenced in the spring of 1982.

DAVIES, J.:

Thank you. And one other question: when were you aware of the problem that you're now trying to resolve?

A. When?

DAVIES, J.:

Yes.

A. In -- I am going from memory -- it would have been late '81 or early '82 when the Buttle Lake Study Group got to the point and said, 'There's where the stuff's coming from.'

DAVIES, J.:

Thank you. Go ahead.

A. Fine. Just a further diagram. Here is where this pipeline came back from the area that I showed you where the pumphouse was located. Here we were catching additional surface water, adding lime in this area and bringing across the stream. There is the pipe bridge and the pipeline bringing it across the stream.

And discharge get into these new settling ponds, enters here, moves over and it's a divided stream so that each of these ponds comes down to here, and is discharged to Myra Creek in this area. The sludge, which is the precipitation that is made in that area, is now added to the flow of tailings which is the waste product from a mill, contains the finely divided waste material rock and is deposited on land in the -- in an area -- and we won't go into that this afternoon.

Now, I want to show you the results of the first two months of this system which was a very experimental system but we decided to put it in with the preliminary information we had, and we were successful in getting a system that worked. I would also like to point out that these scales are different. We have a zero to eight hundred scale in here, and zero to sixty scale here, and we're talking about kilograms per day of zinc that was contained in the effluent.

Now this is the levels during that period of the material that was going in to be treated. This is the level of the effluent on discharge. And if we compare those two we come along with and the level of efficiency that was being achieved, and in most of the cases we were in the high 90's. A couple of occasions here where we had excessive rainfall, that being one of them, when our lime addition system is not adequate, and subsequently at that point we'd had a bag adding system, we had to go to a bulk system with automatic controls on it.

Now --

MR. TOLLESTRUP:

Q. Is the lime addition system now able to deal with heavy runoff situations?

A. Yes. The lime addition system -- add -- treats all of the water now. It treats the water that comes, that is collected from the taillings area because that material precipitates out or settles out. We treat all the water.

Now this is a graph, Your Honour, showing which is of information that is produced by Provincial Waste Management and it shows what was happening to the dissolved zinc that was entering -- the levels of it -- entering Buttle Lake, starting back in the 70's, and you see this rise coming in here. And this is 1981 here when things were changed. And this now shows what has been achieved over to the first samples for 1985. I stress these are Provincial Government figures -- data -- and you can see that the high level that we are -- highest levels we are now at, are similar to those in 1971 and so are the lows. Now we expect it to go down a little further than that but I'm very pleased with that result because it does show that the things we have done have had effect in getting those levels down.

DAVIES, J.:

When was the information that attributed to the year '71 through to '81 available to your corporate entity -- the fact that the zinc was rising until the year that these offences took place?

A. Well where I think -- I can't answer that because I didn't join the company until after this had all occurred.

DAVIES, J.:

I appreciate that and I was going to commend you on later but --

A. But that's public information. It's issued annually at this time, and we get it -- they -- they send it to us.

DAVIES, J.:

I'm going to ask you later why on earth you waited so long to do something about it? And I don't mean you personally because I appreciate that since you got there you've probably done a lot.

A. Well I can't answer that, but if you wish my answer, I was hired because I had had experience in this field.

DAVIES, J.:

Thank you.

A. I had come from a mine in Ireland where we had --

DAVIES, J.:

You see, I'm concerned with why it was allowed to carry on for so long, for sentencing purposes, just as I'm concerned with what you've done about it since to assist in remedying the situation.

A. Sure.

DAVIES, J.:

Thank you. Keep that in mind. Go ahead.

A. Mmm mm. And essentially I don't think I have anything more. Well, that was the end, Jon, but all of the work -- okay, go ahead.

Q. I just have one question. The level that -- showing in that slide is -- conforms with your permit?

A. Yes.

Q. And it's about .04 milligrams per liter?

A. I think it's point -- yeh.

Q. And your permit is .05?

A. Yeh.

MR. TOLLESTRUP:

I think that's all, Your Honour, unless you have -- that is --

DAVIES, J.:

Mr. Bishop, do you wish to ask any questions?

MR. BISHOP:

Yes I just have a couple of questions of Mr. Montgomery.

DAVIES, J.:

You can sit down again if you like, sir.

A. Fine thanks. I'll turn this off.

CROSS EXAMINATION BY MR. BISHOP

Q. Mr. Montgomery, what is your -- what is your area of education and experience? Are you a mining engineer or --

A. I'm a mining engineer.

Q. Mining engineer, okay. Is it fair to say that Western Mines, as it was then, and later Westmin Resources, saved very very large sums of money by not having to install corrective measures earlier - say when the mine first opened -- or when the heavy metal problem first become apparent around 1975?

A. Well, it's again difficult to answer directly when you were not involved at the time.

Q. Yes.

A. Many of the things that we are now using have been developed in recent years in mining on a world-wide basis. So that what we are doing now, we're up in the forefront of the mines in the world that are doing these pollution abatement and have found these things. Certainly it cost us money.

Q. Yes.

A. In the overall if we take all of the things pertaining to the environment in this project which has cost us about two hundred and fifty-million dollars ($250,000,000.00) is what we've expended in the last few years up in that site, approximately fourteen --

Q. Excuse me. I want to clarify that

A. Yeh.

Q. Maybe you were just about to clarify it. Go ahead.

A. Approximately fourteen million dollars ($14,000,000.00) of that is pertaining to environmental improvements.

Q. I see. Okay. Isn't it true to say though that by not doing that until 1981 and after the company saved a very large sum of money because had the money been expended earlier, of course, it would not have had the benefit of keeping the money in its pocket and so on?

A. Well to give you a quick answer: I would think that the cost for the lime that is used for treating at the level they were at -- of production -- might have amounted to a -- remember, it's ballpark figures without -- done on it -- twenty-five thousand dollars ($25,000.00) a year.

Q. Mmm mm.

A. It wasn't hundreds of thousands.

Q. No.

A. But there would have been a capital cost, and again, it would have been a smaller system because we put a system in for an operation that's three times larger.

Q. I see. Okay. Just a couple of other things, Mr. Montgomery, you yourself were a member of the -- I'm sorry -- what did you call the Board or panel that --

A. Of that -- the Buttle Lake Study Group?

Q. Yes.

A. No sir. I was not. We had no staff members on that.

Q. Oh I see.

A. We were represented by Mr. Jackson who was a consultant. He was not a member of our staff.

Q. Oh I see. Okay. The Judge asked you this question earlier and you -- you didn't seem to have an answer but I just wanted to be -- to see really whether you do. Do you know whether the Company was aware, about 1975 or 1976, that suddenly heavy metal levels in Buttle Lake were beginning to rise significantly?

A. No-one has ever stated to me that they did but I -- that information that I showed in that last slide was public information.

Q. I see.

A. So.

Q. And isn't it also true, Mr. Montgomery, and aren't you aware of it, that in fact a number of people in this area expressed concerns about possible pollution before the mine was ever started?

A. I was told that after I joined the Company, yes.

MR. BISHOP:

All right, thank you. That's all I have to ask.

MR. TOLLESTRUP:

A couple of questions --

DAVIES, J.:

Any point you wish to elaborate upon through your witness?

MR. TOLLESTRUP:

Thank you Your Honour.

RE-EXAMINATION IN CHIEF BY MR. TOLLESTRUP:

Q. You mentioned the figure of two hundred and fifty million (250,000,000), Mr. Montgomery, that is the amount that has been expended on opening the new HW Mine --

A. That's right.

Q. -- and includes the fourteen million ((14,000,000) for environmental improvements?

A. That's correct. It also includes thirty million (30,000,000) of interest charges, just to be specific (indiscernible).

Q. Now the mine, I believe, pre-existed the park. Is that correct?

A. Mineral claims pre-existed the park. The mine did not.

Q. Now --

A. Mineral claims go back to 1917 -- the earliest ones.

MR. TOLLESTRUP:

I think the rest of what I need to say, Your Honour, is a matter of argument.

DAVIES, J.:

Yes, well perhaps you'd reserve it anyway, because I intend to ask a few questions and I'll --

MR. TOLLESTRUP:

Sure.

DAVIES, J.:

-- give both of you an opportunity to ask any questions that may arise from mine.

MR. TOLLESTRUP:

Thank you.

EXAMINATION BY **DAVIES, J.:**

Q. Sir, I'm now going to say what I indicated I would say earlier, that I'm impressed with your personal efforts and your obvious confidence in improving a sad situation when you took over. And that is to your credit and the Corporate credit. I am concerned, however, with the many many years that preceded that under circumstances which, frankly, I find appalling. I've looked at the pictures which just to a layman would indicate that anybody who even glanced at those streams on about January of '81 would have been aware that there was a potential problem and it was being -- it was analyzed and it was obviously deleterious to fish. And yet, there's no material difference between the samples taken then and those taken in May of the same year. I think it would be -- for purposes of guilt or innocence, I couldn't consider whether or not it was carrying on from day to day between there but as for sentencing it would boggle my mind that it's just something that happened to go up and up on those four days coincidentally when it was being tested. It flies in the face of common sense. Now, you've shown me graphs indicating a peeking at about '81 of pollutants attributable directly to Westmin Resources or the predecessor Western Mines. I've been advised that this was a matter of grave concern to people in the area as the pollution of a lake. Can you give me any suggestion of a reason that I should consider to the credit of the company why on earth somebody didn't check this out keeping in mind that your learned Counsel has brought to my attention guidelines that indicate that every three months an effluent sample should be taken and presumably done. Can I assume from this that the guidelines were not being followed? Or if they were, could you give me the results of their tests?

A. Well, if I may comment, Your Honour, I think we have to realize that the major source of the increase of zinc level in Buttle Lake was not the discharge from the effluent pond. It was the discharge from the waste (indiscernible)

Q. I appreciate that point but it would all came (sic) from Westmin Resources --

A. That's right.

Q. -- and enough came from that stream, on the samples that I tested, to also be deleterious to fish.

A. Mmm mm.

Q. Now, it's obvious to me as a layman; I'm just wondering if I'm seeing things that aren't there in those pictures. Why on earth would any person of your competence -- maybe I'm assuming something -- your predecessor in office simply take a look at that and say, ' This looks pretty cruddy, you'd better check it,' because if it was, I'd like to know the results of those tests?

A. Again, I don't have that information, Your Honour --

Q. You see I get the impression, sir, and I'm going to give you and your learned Counsel an opportunity to correct me on it -- that up until approximately when you took over and these cases were before the Court, there was a progression of added contaminants into that lake that was known to Westmin Resources. And sofar as I can see, except in taking studies and looking at it, nothing was done until after the four counts that I have to sentence on. Later -- you satisfied me that you've done a very workmanlike job of reducing it. But the question is, under the general heading of detriment to others, why for those many many years wasn't such an obvious -- and if it wasn't obvious please tell me -- such an obvious contamination of a source allowed to continue?

A. The only comment I can make, Your Honour, not having the information and not being present, is that those things can vary over a period of time based on the experience we now see that -- and we have to -- had to automate the controls so that we are having readings all of the times telling us of the condition of the water before it goes in so that we can make the treatment applicable to the condition that has been there --

Q. No, that isn't the point. The point is, that for year after year after year the general knowledge -- and you said the official documents --

A. Yeh.

Q. -- more and more zinc pollutant was going into that lake, and until you took over, in effect, nothing seems to have been done about it to seriously find out how to stop it, or even to attempt to stop it --

A. Mmm mm.

Q. -- you indicated that you spent fourteen million dollars ($14,000,000.00) on I think you said improving the environment.

A. Improving the environment, yeh.

Q. Well, how on earth could you improve the environment as to what it was before you started operation -- you, the Corporate entity -- in that area? I understand it was a pristine valley, clean with no pollutants to talk of. How can you say that you've improved it by getting some of the -- by putting less into it?

A. Your Honour, it's quite possible that there were metals being dissolved by nature. I'm not willing to do -- we don't have any base line studies to go back to. But we find metals by going up streams --

Q. Well we do have upstream -- upstream tests on Myra Creek which indicates it's minimal as of the test period that I'm dealing with.

A. -- Yeh. Mmm mm.

Q. Fine.

A. Okay.

Q. And there's no -- nothing to suggest it was different anywhere else.

A. I find it very difficult to answer --

Q. I thank you sir. I'm -- perhaps I'm getting into a field that I should be hearing your Counsel on. But I wanted you to have any opportunity and to ask you enough questions so that your lawyer would realize what's concerning me. Thank you. Any questions arising from mine.

MR. TOLLESTRUP:

None for me, Your Honour.

DAVIES, J.:

And any last submission from the Crown before I -- because Mr. Tollestrup's going to be heard last.

MR. BISHOP:

No Your Honour --

DAVIES, J.:

Thank you, then I'll hear the Defence and --

MR. BISHOP:

-- I don't think I have anything more to say.

DAVIES, J.:

-- final submission as to sentence.

Thank you sir.

MR. MONTGOMERY:

Thank you.

(WITNESS EXCUSED)

DAVIES, J.:

Oh, before you go, sir, I think the smartest thing that Westmin did was to get you from Noranda (phonetic). Thank you for coming.

MR. TOLLESTRUP:

Mmm mm. Your Honour, I think this has to be put into context in terms of time.

DAVIES, J.:

Yes.

MR. TOLLESTRUP:

We're talking about offences that were alleged in --

DAVIES, J.:

January, February, March and May of sev . .

MR. TOLLESTRUP:

1981. Yes.

DAVIES, J.:

. . enty one, right?

MR. TOLLESTRUP:

The slide that show the information from 1975 on --

DAVIES, J.:

Yes.

MR. TOLLESTRUP:

-- may have been developed from data that was not available in 1981.

DAVIES, J.:

That's rather interesting. How do they go back and get it then?

MR. TOLLESTRUP:

Well I'm suggesting to Your Honour that that may have become available through the Buttle Lake Study Committee.

DAVIES, J.:

Been available -- information that was obtained in '75 doesn't become available until '81? Please.

MR. TOLLESTRUP:

No, I'm saying that it wasn't OBTAINED in 1975. That the -- although the data was there --

DAVIES, J.:

Yeh?

MR. TOLLESTRUP:

— no-one had done a study, costing approximately a million dollars ($1,000,000.00) to put all of that data together and be able to come up with this kind of information. And so --

DAVIES, J.:

Just stop a moment: if in three years -- I'll take just a short period — if in three years you get a rising that should be a warning to somebody'd better look at it. And that's what I have from those graphs.

MR. TOLLESTRUP:

Yes.

DAVIES, J.:

Thank you. Go ahead.

MR. TOLLESTRUP:

And the other -- the other submission I have on the graph is that there is no evidence that the source of that rising metal level in Buttle Lake was entirely from the mine. There was evidence given through Dr. Clark and I think through either Dr. McLeay -- yes I think it must have been Dr. McLeay, that there were other contributing sources -- natural sources -- to metal levels in Buttle Lake. The charges that this Court is concerned with are depositing deleterious substances on certain dates. Now, if you -- as Your Honour suggested -- it flies in the face of commonsense to say that the sources through the mine did not contribute to say that the sources through the mine did not contribute in some degree to the rising levels but, in my submission, this Court cannot conclude that the totality of the rising metal levels can be laid at the doorstep of Westmin Resources. And I draw the distinction between depositing a dele —

DAVIES, J.:

Well, let's put it this way. Since Western Mines stopped doing it, it's gone right back down.

MR. TOLLESTRUP:

— Well since they --

DAVIES, J.:

And that's a factor I have to consider.

MR. TOLLESTRUP:

— Oh yes.

DAVIES, J.:

Then go ahead.

MR. TOLLESTRUP:

I don't quarrel with that but there is still some there and it may or may not be coming from a natural source. But again, I say that --

DAVIES, J.:

Let's put it in its kindest light. Let's presume that there is a percentage from natural sources -- the natural sources that were there have been there since time immemorial and I presume will continue. But, when Western Mines, in an effort to reduce its obvious -- to stand up to its Corporate responsibilities did what I was told, down came the lime. So that indicates to me that that which they remedied -- had previously remedied -- been a factor and the factor is what I am going to consider for sentencing purposes.

MR. TOLLESTRUP:

All right. Now, may I emphasize, Your Honour, that Mr. Montgomery said that the conclusions of the Buttle Lake Study Committee were made known in early 1981, and that work on the system to correct the problem began in the spring of 1981, and that it was put into place in November of 1981.

DAVIES, J.:

Mmm huh uh -- that wasn't the impression I got. I thought he said spring of '82.

MR. MONTGOMERY:

Eighty-two.

MR. TOLLESTRUP:

Was it '82?

MR. MONTGOMERY:

Eighty-one was the testing year. (Indiscernible).

MR. TOLLESTRUP:

Yes, I'm sorry. I'm sorry. The testing year was '81. The conclusion I -- my note says the conclusions were not known until early '82. Then the work began shortly thereafter and it was put into place by October/November of '82. So that once they knew precisely what the problem was, i.e. the leaching from the waste rock dump, they commenced immediately to correct it. And again here, Your Honour, I emphasize the difference between knowing that a problem exists and knowing what the source of the problem is. Mr. Montgomery says that the conclusion of this study was that the majority -- and we agree, not all -- of the heavy metal depositing came through the bacterial leaching from the waste rock dump. And that -- the knowledge that that was the main source did not come to light until the conclusion of the Buttle Lake Study Committee which was early '82 and then the work was begun right after that. And in the last four years they've spent fourteen millions dollars ($14,000,000.00) developing what, in my submission, is a state of the art system to deal with the disruption to the environment that any mining activity creates. I submit, Your Honour, that it flies in the face of common sense and reason to think that man can disturb the earth in the way that it is disturbed through mining activity without disrupting the environment, and the responsibility -- the Corporate responsibility -- is to minimize the effect upon the environment.

DAVIES, J.:

Yes.

MR. TOLLESTRUP:

And I, my submission is, that once the cause of the problem was known my client acted quickly, and at great expense. And I submit, Your Honour, that it's going a bit -- it's getting a bit tangential to place too much emphasis on what happened before they knew exactly what the problem was.

I emphasize also that --

DAVIES, J.:

They knew what the problem was all along -- they may not know the cause of it.

MR. TOLLESTRUP:

All right.

DAVIES, J.:

The problem was too much effluent getting into Buttle Lake, period. Coming from their workings. Wasn't it?

MR. TOLLESTRUP:

The problem was a rising metal level, Your Honour, --

DAVIES, J.:

Mmm mm.

MR. TOLLESTRUP:

-- and I get back to this: there's no evidence of fish kill. There's no evidence of any harm to the fisheries other than in the bioassays and you've heard a lot of evidence about --

DAVIES, J.:

Yes.

MR. TOLLESTRUP:

-- how conclusive those bioassays were, but there is no evidence of any fish kill in the water system. And there was a substantial amount of evidence that these metals are not harmful except in a particular form, so that even though you have a rising metal content, in the absence of any damage to the fishery there is -- there's cause for alarm but it's not the kind of alarm that would go off in peoples' minds if all of a sudden they were finding dead fish -- if there was some concrete evidence that there was damage to the fishery. Now, my friend has said that the people were concerned when the mine went in about the environment -- well that happens wherever a mine goes. I would be --

DAVIES, J.:

If you put the taillings into a lake that I'm now told -- and I didn't have this before me at the trial -- that is what, source of water supply, I don't find it at all unusual people would be concerned. I now understand that there's cyanide going in there as well, in, I hope, extremely minute quantities.

MR. TOLLESTRUP:

Well the cyanide is in an enclosed system, Your Honour.

DAVIES, J.:

No, the cyanide's going into the -- the cyanide treatment is going into those ponds, I was told. That's one of the changes that was made.

MR. TOLLESTRUP:

Yes.

DAVIES, J.:

Mmm mm. And it goes from there -- if it doesn't stay there, it ends up in Buttle Lake via Myra Creek again.

MR. TOLLESTRUP:

But it stays in the sediment pond, Your Honour.

DAVIES, J.:

I haven't been told that.

MR. TOLLESTRUP:

Well, but you also haven't been told that there's any evidence of cyanide going into the Buttle Lake water system.

DAVIES, J.:

Not but I have -- I have that cyanide is now being introduced into the settling ponds.

MR. TOLLESTRUP:

Yes.

DAVIES, J.:

And added to the effluent there.

MR. TOLLESTRUP:

Yes but surely that's not a factor that Your Honour can take into account in the sentencing unless it's getting into the Buttle Lake water system.

DAVIES, J.:

No I don't think that I can consider what they're doing now. There's no evidence that that was there at the time at the alleged offences that I found took place. They're no longer alleged.

MR. TOLLESTRUP:

Yes.

DAVIES, J.:

Right. But, if I'm going to give you credit for putting lime in to reduce it -- and I intend to do -- why shouldn't I also consider the other items you've put in there that may not be so helpful to the air? (sic)

MR. TOLLESTRUP:

Well perhaps just to clear that point up it might be useful if I were to recall Mr. Montgomery, because I think he can explain the presence of the cyanide and the fact that it is put in there not through the milling or mining process, it's put in there as a solution to part of the environmental problem.

DAVIES, J.:

Oh?

MR. TOLLESTRUP:

Would you mind if I just call --

DAVIES, J.:

I don't mind at all.

MR. TOLLESTRUP:

— recall —

DAVIES, J.:

You have -- I'm going to give you also . . all the leeway you want, subject to your catching your plane. And even if you don't, that's your option.

MR. TOLLESTRUP:

There are other planes, Your Honour.

DAVIES, J.:

I've taken the position, a thing as long as this -- especially where I find against the Defence, the Defence has as long as the Defence wants to put any evidence it wants before me. Proceed.

MR. TOLLESTRUP:

Thank you, Your Honour.

DAVIES, J.:

You're still under oath, obviously.

RE-EXAMINATION IN CHIEF BY MR. TOLLESTRUP:

Q. Would you please explain to His Honour the presence of cyanide and what its purpose is, Mr. Montgomery?

A. Well first of all I have to say that it is part of the metallurgical process --

Q. All right.

A. -- of separating metals in the mill.

DAVIES, J.:

That I -- that I perhaps had suspect -- I shouldn't say that. Let's put it this way: I was a lawyer for 14 years before I became a judge and I have some knowledge of mining. Go ahead.

A. It is used, to be technical, as a depressant to keep the pyrate from not floating. We do not want (indiscernible) when we're separating pyrate from other metals. Pyrate is an iron sulfite.

MR. TOLLESTRUP:

Q. And how is the presence of cyanide dealt with in the system, eventually?

A. That effluent from that particular portion of the processing was collected and is taken out and is chlorinated and that's why it's called an alkaline chlorinated stream. It is a -- there is -- chlorine is injected in a negatious form into that stream and that kills -- the cyanide becomes another compound -- I was going to say a cyanate -- there may be somebody else here that can tell me exactly what it is. But cyanide as cyanide is a very sensitive chemical but when it becomes a cyanate or another chemical compound -- it may be occurring in this case; I don't know the chemical things that go on; it becomes a very inert and it is not a problem. Cyanate is not a problem but cyanide surely is. The alkaline chlorinide -- chlorinated stream -- is to get rid of the cyanide and have it in another form where it is inert.

Now, the reason that that chlorinated stream was added, I believe -- and I wasn't with the Company at the time -- was it was another strongly basic substance which would help to precipitate the metals. That's my understanding of why that was added.

Q. And once the cyanide was treated with alkaline chlorination then the whole was then discharged into the settlement ponds?

A. It went into those Lynx settlement ponds that we showed you the pictures of and then subsequently was discharged to Myra Creek.

Q. But before that happened the toxic effect --

A. Previous to that it was discharged with the taillings in Buttle Lake directly --

Q. Yes.

A. -- after treatment with the chlorine.

Q. Right. And after treatment by the alkaline chlorination the toxic effect --

A. Mmm mm.

Q. -- of the cyanide was neutralized.

A. It was -- yes, it has never been a -- brought to my attention at any time --that we had cyanide levels that were of concern -- that I'm aware of. I've never heard of cyanide being a concern.

MR. TOLLESTRUP:

His Honour may have questions arising on that.

EXAMINATION BY THE COURT:

Q. My questions obviously arose from the evidence of Dr. McLeay where he first brought to my attention the changes that were made, and you may be able to assist me I feel that all people -- all honest people -- and I heard here commented that the honesty of witnesses before me is not an issue -- frequently suffer from what I call self-hypnosis. If, for example, you ask a person who has just run a red light, which is a stupid thing to do, he ran that red light and he sees it and it's still red he says, 'I did,' but if you later say, 'You ran a red light, that's a stupid thing to do,' he's not a stupid person, therefore he didn't to it, and I think after a little while he'd pass a lie detector test. And this is by way of the problem that I had with the evidence of Dr. McLeay when he told me that he couldn't remember the results of tests that he did in June of 1981 when he was asked not the results of such but was there a deleterious substance to fish found. I found that difficult to accept because it was -- if it was good, it's the sort of thing you'd remember if you were an expert coming to Court and one month after the cases it would certainly be a mitigating factor -- he says, 'Look, we just checked it afterwards.' Do YOU know the results of the biopsy tests that were done pursuant to the Guidelines as required in June of 1981?

A. No Your Honour I do not.

Q. Do you know whether or not they were ever done during the period that I'm concerned with which is January through till --

A. I do not, Your Honour.

Q. (Indiscernible) the four days that are in that period?

A. I do not, Your Honour.

MR. TOLLESTRUP:

Your Honour, could I interject here?

DAVIES, J.:

Yeh.

MR. TOLLESTRUP:

You read the portions of that transcript earlier and it's my recollection that -- the kinds of testing that my friend asked Dr. MacLeay about were not identified. That is, was he testing for the existence of metals or was it a bioassay test that he was asked about.

DAVIES, J.:

No. The question was, "All right, what was the results of those tests as far as whether you found the liquid in those settling ponds to be deleterious to fish?" was the question.

MR. TOLLESTRUP:

So I simply make this point then --

DAVIES, J.:

So I though the answer would be, 'Yes it wasn't,' or 'Yes it was but,' or something but I have come to the conclusion -- and I'm saying it on the record for Appellate purposes -- that when the time span is so close and nobody including this gentleman can tell me those results that the results would not have supported the Defence position.

MR. TOLLESTRUP:

Well I -- I simply make this observation that if he was talking about a bioassay test and that wasn't identified, then Dr. MacLeay could have had a clear -- he would have remembered --

DAVIES, J.:

What's he supposed to be doing? --

MR. TOLLESTRUP:

-- whether fish were killed --

DAVIES, J.:

-- He said he went in there at the request -- to do tests -- if it was pursuant to the Guidelines isn't he required to do a flow-through test every three months for somebody?

MR. TOLLESTRUP:

Well he may have just been doing a metals test though, that's my point.

DAVIES, J.:

Well why didn't he say so?

MR. TOLLESTRUP:

I don't know.

DAVIES, J.:

He was a long ways from being articulate.

MR. TOLLESTRUP:

Well in fact, I know the answer to that but that's not going to help Your Honour at this point.

DAVIES, J.:

Mmm. Mmm mm. If you known whether or not they were complying with the Guidelines throughout, I think it's a factor. You don't have to tell me, of course if they weren't but I'll say this: it's a double-edged sword. Either they complied with the Guidelines -- which is not a part of this charge -- but it's a factor I'd consider in mitigation as a partial defence of due diligence. If they did take the tests and they were negative, that is, they showed that they were -- confirmed the position taken by the Crown -- then I rather question the statement made by one of your witnesses, this is an exercise in truth -- I'm paraphrasing.

MR. TOLLESTRUP:

Well, I don't want to get into the position of giving evidence but I --

DAVIES, J.:

No. I -- thank you --

MR. TOLLESTRUP:

-- but I do underst . .

DAVIES, J.:

-- Is there anything you wish to add? You see, I have assumed, because you raised the Guidelines, that I should consider them, only in respect to sentencing. And that's why I kept right out of that but now we're at the sentencing stage.

MR. TOLLESTRUP:

Yes. Well just to -- just to follow through on that Dr. McLeay business: Dr. MacLeay couldn't remember when he was asked on the stand what kind of test he did in June, whether it was a bioassay or metals test. In fact, he later told me that it was a metals test and that the results as best he could remember were that the readings at Myra Falls were high. Now, that is downstream of the waste rock dump and it was as a result of the high readings at Myra Falls that their attention was directed toward the waste rock dump.

DAVIES, J.:

You see, perhaps I'm being overly simplistic, but if I was a representative of a multi-million dollar corporate entity and I had evidence heard against me in Court indicating that I was not a good corporate citizen because I was polluting a stream, I would have certainly made sure that if there was any hope that there was an error in that, that I'd be able to come to Court and say, 'Well I would like to point out that with due diligence we checked the following and we found the following, and we did the test the way we said you should have done it.' You see, I haven't heard any word about that at all but I do notice from the Guidelines it's required to be done every three months, and there's a lot of three months' periods prior to this good gentleman taking over the management of the Company.

MR. TOLLESTRUP:

Well, Your Honour, a deliberate decision was made in respect to that because of the wording of the Act. It says, "depositing a deleterious substance" on a particular day.

DAVIES, J.:

Mmm mm.

MR TOLLESTRUP:

The only way that we can answer that would be to have made our own tests on those days.

DAVIES, J.:

Mmm mm.

MR. TOLLESTRUP:

It seemed to us it's the other side of the coin, if you will: on the one hand I'm trying to limit the evidence that the Crown adduces to those days so that we can deal with those charges.

DAVIES, J.:

Yeh.

MR. TOLLESTRUP:

If it's irrelevant for him to bring evidence about other days, it's irrelevant for me to bring positive evidence about other days. If I could have —

DAVIES, J.:

Well if that could —

MR. TOLLESTRUP:

-- said we did a test on January --

DAVIES, J.:

-- No no, I'm not following you, Counsel. You, like all lawyers, enter in the picture after the deed is done and try to make the best light of it -- that's your job and I'm not being sarcastic. There is -- you don't have to prove your client's innocence. You have to make sure the Crown doesn't prove their guilt. Unfortunately the Crown did. The issue though is this: if there was any desire by the Corporate entity in -- we'll take the February testing -- to determine when that stuff was up there, that it was not putting out deleterious substances, to simply check with the Fisheries Department, to say, 'Look, the stuff is gushing out over the top. I understand you're coming up to test it,' or 'Are you coming up to test it? Because if you do, we'd like to test it at the same time so we'll run ours through pretty complicated tests and we'll have evidence so we really know if it is or it isn't.' Hopefully, if it's pollutants, they'll do something to stop it. I, earlier, averted to replicate tests which I feel are essential to determine the purity of water going into a fisheries because you're putting captive fish in a concentrated form in water that has to be just better than good -- as good as you can possibly get it. So one test that showed that that is good shouldn't be definitive. There should be about ten tests that show it's good before they should put fish into it -- in my opinion only -- however, if on that first or second -- first test -- all the fish die, I'd suggest that source of water should be rejected forthwith. Now, they're quite different standards. Here, the Corporate entity has a duty under the bylines -- Guidelines -- as you point to me, to cause testing to be done and how that testing should be done: it should be done every three months. I'm satisfied if it had been done it wouldn't be here in front of me. If they'd complied with the results, they'd have rectified it and sometime between '77 and January of '81. That's all I have to say on the subject but I thought you should know that before you close your case.

MR. TOLLESTRUP:

The -- I think there is no evidence that -- that the results of the first test on January 28th were made known to the accused before the fourth test on May the 3rd.

DAVIES, J.:

Thank you.

MR. TOLLESTRUP:

My friend made a point that there were fish upstream of this outflow from the settling ponds but none found below that outfall, and I say that there could be a simple explanation for that, that the cloudy water caused an avoidance reaction --

DAVIES, J.:

Mmm mm.

MR. TOLLESTRUP:

-- Your Honour knows that when silt and debris and so on is dumped into a stream the first thing the fish will do is try to avoid it if there's some place else to go. So I don't think that --

DAVIES, J.:

When do you think they do that?

MR. TOLLESTRUP:

Well I -- I seem --

DAVIES, J.:

Because they're not worried about the scenery.

MR. TOLLESTRUP:

-- Well --

DAVIES, J.:

They do it because I think -- I suggest they do it because they think it might be unhealthy to stay there.

MR. TOLLESTRUP:

Well perhaps not though, Your Honour.

DAVIES, J.:

Thank you.

MR. TOLLESTRUP:

Ah you're --

DAVIES, J.:

Unhealthy or unable to see food --

MR. TOLLESTRUP:

-- asking me --

DAVIES, J.:

-- that's not good for them either.

MR. TOLLESTRUP:

— You're asking me to think like a fish. If —

DAVIES, J.:

Well.

MR. TOLLESTRUP:

-- If the water's cloudy perhaps they can't see what they're feeding on.

DAVIES, J.:

It's a high standard for us. I don't know that I could achieve that standard.

MR. MONTGOMERY:

Your Honour, may I add something?

DAVIES, J.:

I think I have to -- I say I think I have to think for fish if not -- go ahead.

MR. MONTGOMERY:

Go up into the Stewart area and see some of the discharges from the glaciers there and you'll wonder how they can -- there's so much silt in the water that the salmon are running up that you can't understand how they get there. I'm sure some of our other people will have had that --

DAVIES, J.:

You mean in the Salmon River? I believe it's the Salmon River there, isn't it?

MR. MONTGOMERY:

It's the Salmon River.

DAVIES, J.:

Yes, I've fished it.

MR. MONTGOMERY:

The Salmon River -- you've seen that material, it's --

MR. TOLLESTRUP:

I think you will --

DAVIES, J.:

I commented about the mining. The first job I had out of the high school was with Silbac Premier (phonetic) in the panhandle. Go ahead.

MR. MONTGOMERY:

Okay, no problem. I shouldn't have added that but I thought I would.

MR. TOLLESTRUP:

Just to conclude my submissions then, Your Honour, the -- there is no evidence of any damage to the fishery or any evidence of fish kill. I think that's important.

There have been no other charges and no other convictions relating to -- well obviously, there can't have been convictions if there'd been no other charges -- relating to the -- relating to this section of the *Fisheries Act* or any other matter relating to polluting the environment against my client. It's a first offence. In my submission, they have been exemplary corporate citizens since early 1981, late 1981 and --

DAVIES, J.:

With you on that: late.

MR. TOLLESTRUP:

-- and that they've done everything reasonably possible to correct what they discovered was a serious problem, and the evidence of Mr. Montgomery today is that they HAVE corrected the problem -- that the amount of zinc that is being discharged into the lake, IF harmful at all, is in such minute quantities that --

DAVIES, J.:

I keep saying I wasn't going to interrupt and I keep breaking my work. I'm sorry. You've stressed how much they've spent. Would you mind telling me how much they made? This is not a benevolent society. They spend money to make money, I assume.

MR. TOLLESTRUP:

Oh yes I'm sure, Your Honour.

DAVIES, J.:

All right. They spent that much — how much did they take out of the area?

MR. TOLLESTRUP:

Well I'm not sure that's a fair question, Your Honour.

DAVIES, J.:

Oh. If -- well if you're going to say you're spending money to keep the stream so that you can operate I think it's only fair to know how much you make by keeping the right to work there. If something hadn't been done presumably sooner or later that mine would have to have been closed down, so I presume they want to keep it open so they can make money. If you don't think it's fair for me to know how much they make, under the other heading I'm going to ask another question: what is their ability to pay a fine?

MR TOLLESTRUP:

Well I'm sure -- I'm sure that I can rely upon Your Honour's good judgment to impose a fine that they will be able to pay.

DAVIES, J.:

The law requires me to. The most I can fine them is two hundred thousand dollars ($200,000.00).

MR. TOLLESTRUP:

Yes.

DAVIES, J.:

And I'm sure they can pay that. But you're asking to impose something less, and I'm going to ask you why should I.

MR. TOLLESTRUP:

Well, Your Honour, I've given you my submissions --

DAVIES, J.:

Thank you.

MR. TOLLESTRUP:

-- and I've asked Mr. Montgomery to appear here before you today to indicate what the accused has done. I'm not aware that -- of a principle that says they should be fined more if they can pay more.

DAVIES, J.:

That is not the principle. They should not -- a fine should not be imposed that is not within their means or ability to pay -- it's quite the reverse.

MR. TOLLESTRUP:

Yes. Well I think on the basis of the authorities even my friend submitted, Your Honour, that this should not be a situation where the maximum fine is imposed.

DAVIES, J.:

Thank you.

MR. TOLLESTRUP:

I --

DAVIES, J.:

You don't need to stress that. I don't think it's a matter where the maximum fine should be imposed in keeping with justice, but I don't believe minimal fines such as were suggested by those other courts are adequate either. Go ahead on that basis.

MR. TOLLESTRUP:

Well Your Honour, I think they're -- as I say -- that the highest case that my friend submitted to you was one in the Coquihalla River where there had been fish kill, and those were -- there were nine counts, I believe, and the fine imposed there was fifteen thousand dollars in each case.

DAVIES, J.:

Mmm mm.

MR. TOLLESTRUP:

Now I say that there has been no fish kill here that Your Honour's deliberations, in my respectful submission, should be confined to the deposit of deleterious substance and not to the pollution because there is no evidence of pollution in that broader sense --

DAVIES, J.:

Thank you -- you're correct.

MR. TOLLESTRUP:

-- and so in my submission I would think a nominal fine in each case would be appropriate and I -- my concluding comment is that, of the four counts, there were only two that related to bioassays. And in my submission, the two that were not related to bioassays --

DAVIES, J.:

I know. And only two of them was there evidence of bioassays.

MR. TOLLESTRUP:

Yes.

DAVIES, J.:

A little different. Go ahead.

MR. TOLLESTRUP:

Yes -- January 28th and May 3rd --

DAVIES, J.:

Yes.

MR. TOLLESTRUP:

-- each had bioassay tests. The others did not. I think that should be taken into consideration in imposing sentence. Thank you, Your Honour.

DAVIES, J.:

Thank you. I think it would be appropriate if we take a fif . . when do you have to leave here to get your plane?

MR. TOLLESTRUP:

Our plane is , I think, at 2:20, Your Honour.

DAVIES, J.:

Fine. We'll take a 15 minute adjournment so that I can consider these last few remarks that were made -- and reach my sentence decision.

(PROCEEDINGS ADJOURNED)

(PROCEEDINGS RECONVENED)

DAVIES, J.:

Be seated gentlemen.

As we've had an adjournment and as the human mind frequently thinks of things during that time, I now, before passing sentence ask either Counsel for the last time, do you have anything you wish to add?

SENTENCING

In passing sentence the Judge is required to consider the protection of society, a deterrent to the accused and to others and where it is a person rather than a corporate entity, the rehabilitation of that person. I will make reference to rehabilitation in the corporate sense in a moment, as I think that too is a factor that should be considered.

Evidence heard today as to sentence was directed to the efforts made by the corporate entity in late 1981/82 after the incidents took place that have been in issue before me. I was, and stated, favourably impressed with the present manager of the corporate entity. I would add to that I am reasonably satisfied that he was brought in to clear up a mess and is doing a good job at it. The efforts being made by the corporate entity are commendable and reflect at long last a proper concern for the area, and it is a factor to be considered in mitigation as with the rehabilitation of any other person.

Since late 1981 great steps have been taken to minimize the problem. However, just as I consider such conduct to the corporate credit so must I consider the years of indifference and neglect prior to and during the first five months of 1981. I do not wish to be considered as saying that the corporate entity deliberately deposited such substances but their casual disregard is tantamount to willful blindness. Fines -- and I've been advised and knew in any event -- the maximum fined on each charge is fifty thousand dollars ($50,000.00). Maximum is principles of sentencing that I will now apply -- maximum sentences should be imposed only in maximum sets of circumstances, and rarely then are they, in fact, imposed. The fines should be (1) that will discourage repetition of such conduct not only by this Company but by others. It should be a fine that reflects the concern expressed by the Appellate Court cited to me by learned Counsel for the Crown; the remarks I refer to are those of His Lordship Mr. Justice Seaton which I had read as part of my preparation when I took over this case. I will add, and I think it proper to do so, apart from the section read in by learned Counsel for the Crown, there's another paragraph. I'm going to read that into the record:

> "I would hope that on the retrial . ."

and I'm reading now from page 9 of the actual order of their Lordships and the appeal that made this trial necessary, he said:

> "I would hope that on the retrial the accused too would think that it to be so . ."

that is, that the society considers pollution to be a very important matter:

> "and would face its responsibilities to deal with this matter on its merits. I think the way in which this matter has progressed does not bring credit to those involved."

I must, in fairness to learned Counsel for the Defence, state that he has certainly complied with the directions of the Appellate Court. He has dealt with this in a responsible manner and has dealt with it on its merits. And I commend him for following the comments made by His Lordship.

I have to keep in mind that these are -- there's no Kienapple principle applicable here. That is, that each are separate charges that should be dealt with as such. And I have to keep in mind when I am imposing sentencing the totality of the sentence would result. For those reasons, I assess a fine and order the corporate entity to pay a fine of twenty thousand dollars ($20,000.00) on each count, keeping in mind the totality, that is: eighty thousand dollars ($80,000.00).

BRITISH COLUMBIA PROVINCIAL COURT

R.v. WILLIS, CUNLIFFE, TAIT & CO.
AND SPRING POINT MANAGEMENT LTD.

BARNETT, J.

Quesnel, June 16, 1987
June 22, 1987

Fisheries Act, R.S.C. 1970, c.F-14 as amended - Both accused charged with sixteen counts under section 33(2), depositing a deleterious substance into water frequented by fish - Treated sewage in excess of authorized amount into Baker Creek.

Sentencing - Release of treated sewage in excess of authorized amount is more than an oversight - Fine of 350.00 levied on each count.

Sixteen charges under section 33(2) of the *Fisheries Act* were laid against the City of Quesnel, Willis, Cunliffe, Tait and Company (consulting engineers) and Spring Point Management Limited (a general contracting company). The charges against the City of Quesnel were stayed.

The accused, Willis, Cunliffe, Tait & Co. indicated a plea of guilty in advance of the trial date.

The City of Quesnel was originally issued a permit in 1976 to allow the discharge of 125,000 gallons of treated sewage per day into Baker Creek.

The plant continued to operate though the permit had expired in 1978 and was not formally renewed. Sometime prior to 1986, discussions were held about upgrading the city's sewage system and the accused, Willis Cunliffe, Tait and Company were engaged as consulting engineers on the project.

At an early stage in the planning process it was recognized that in the course of upgrading the system, a line which took some of the West Quesnel sewage into the Quesnel control plant, would have to be disconnected during the work. As a result of this disconnection, instead of 125,000 gallons of treated sewage, over 200,000 gallons was being discharged into Baker Creek on a daily basis for the period between August 24th and September the 11th.

The Court found that there was insufficient serious effort made to deal with the Waste Management Officials. Further, the smell and the discolouration of Baker Creek observed by a police officer on September the 8th, was something the project manager for the accused must have been able to see.

The incident was not an oversight; it was a very visible sight. Nobody could fail to see what was happening and nobody alert to the situation and his obligations could fail to understand that what was happening was wrong. The accused, Willis, Cunliffe, Tait and Company, more than the others, should have been alert to it.

There is no suggestion here that there was a deliberate plan to do something wrong. A fine of 350.00 on each of the 16 counts was ordered against each of the accused, Willis, Cunliffe, Tait and Company and Spring Point Management Limited.

J.D. Cliffe, for the Crown.
R.W. Hunter, for the Accused. (Willis, Cunliffe, Tait & Co.)
T. Hatch, for the Accused. (Spring Point Management Ltd.)

BARNETT, J.

The charges here are under section 33 of the *Fisheries Act*. There are 16 separate counts; that simply reflects the fact that the *Act* provides that each day an offence continues is to be treated as a separate offence. But we are dealing here, really, with a continuous course of admittedly wrongful action.

The information charges the City of Quesnel, Willis, Cunliffe, Tait and Company (which were acting as consulting engineers) and Spring Point Management Limited (which was acting as a general contracting company). The charges have been stayed against the City of Quesnel and the sentencing of Spring Point Management is to occur on a later date. I am dealing now only with Willis, Cunliffe, Tait and Company.

What happened here was that the City of Quesnel had a sewage treatment system which was in need of replacement and upgrading and this had been recognized for a number of years. Specifically the plant in West Quesnel had had a permit issued back in 1976 but that permit expired in 1978 and it was not formally renewed, although the plant continued in operation. The permit had allowed the discharge into Baker Creek every day of 125,000 gallons of treated sewage.

Long before 1986, there were discussions about getting this plant out of operation and in a general way the plan was to mix the city's sewage with the effluent from the Quesnel Pulp Mill and the result of all that would be a considerably upgraded system, and this all finally came together, after many years of discussion, in 1986. As I understand it, Willis, Cunliffe, Tait and Company were engaged, perhaps early in 1986, to get the work of consulting engineers under way.

It was recognized, as I understand it, at an early stage that in the course of upgrading the system, it was going to be necessary to divert some of the West Quesnel sewage. There was a line which took some of the West Quesnel sewage into the Quesnel central plant; that line was going to have to be disconnected during the work and something had to be done, everybody knew that.

In June of 1986, Willis, Cunliffe, Tait and Company sent to the Waste Management Branch which would be the Provincial Government Agency that would have to give approval and issue permits and in the course of doing that would consult with the Fisheries people. But in June of 1986, Willis, Cunliffe, Tait and Company sent to the Waste Management people the design plans for this project and there were some discussions, I believe it was, with a Mr. Stevens in Williams Lake concerning these design plans. But no permit was sought at that time and certainly no permit was issued.

The actual contract was awarded, and that was to Spring Point, on the 18th of August, 1986. Now, everybody knew about the diversion, also, quite obviously, everybody recognized the obvious practical need to get the work under way soon, hopefully to be completed before freeze up. The contract is awarded on the 18th of August to Spring Point; they are general contractors. Willis, Cunliffe are the consulting engineers, as I have already said.

On the 21st of August, there is a pre-job meeting at which a number of persons attend and they are discussing things that are necessary in the course of this project and whose responsibility it is as between themselves to carry out certain tasks. And at that meeting (and Willis, Cunliffe, Tait were not only there in a real sense, they were in charge) there was discussion about the requirements to deal with Waste Management people. It was actually anticipated between the parties that it would be Spring Point that would do this. That is the 21st of August.

On the 24th of August, the work gets under way. And what happens is that when the line to the central plant is necessarily interfered with, instead of 125,000 gallons daily going through the West Quesnel Plant, (admittedly obsolete and in need of upgrading and perhaps having been at times running over whatever was originally contemplated for that plant back in 1976) it is now up to a little over 200,000 gallons a day. And the 200,000 gallons a day that are going through that plant and, thus, being less adequately treated than ever before, are not 200,000 gallons of quite the same effluent even. What is coming out of the West Quesnel Plant now into Baker Creek is a discharge which is excessive in terms of the number of gallons per day but it is also excessive in terms of its toxicity to fish. And this continues for some little while, finally coming to an end of the 11th of September.

There simply has not been any sufficiently serious effort to deal with the Waste Management people and to get their formal approval and a permit from them. And the effluent which is being discharged from the West Quesnel Plant (and the photographs quite clearly show this) is visibly and obviously a quite unacceptable situation.

On the 8th of September, a police officer observes that that is so. He can see, as anybody could, the discolouration of a section of Baker Creek and the smell. And he reports the matter (or she does) and the Fisheries people become involved and by the 11th of September the situation is brought under control, but not until then.

The Project Manager for Willis, Cunliffe must have been able to see, as anybody could and as the police officer did, that this situation was simply intolerable. The situation before was not a good one, perhaps, but the situation after the excessive discharges began on the 27th of August was, in my assessment of the situation, obviously an unacceptable one by any standard, and markedly worse.

Baker Creek is a tributary of the Fraser River and there are fish in it. There are rainbow trout in there, there are salmon that have spawned in the creek, chinook salmon in particular spawn in Baker Creek and there are fry in the creek; there were fry there during this period of time. This discharge was very toxic to those fish. There are also coarse fish in the creek. But when live fish were put in this effluent and there was a plume of pretty much nothing but effluent visible in the creek, when fish are put in it, they die and they die quickly. Now, it is so that nobody can say that he or she found a dead salmon fry or dead rainbow trout killed by this discharge but that does not mean that fish were not killed or harmed. And, as I observed during the course of counsel's submissions, and other judges have observed, this sort of pollution is accumulative in its effect and the Fraser River, as is notoriously known in British Columbia, is no longer the virgin and once rich, perhaps the richest, salmon river in the world that it once was. It has been badly overloaded for a long time now with pollutants of all kinds and every responsible person in British Columbia knows that that is so and is aware of the need not to contribute even more to the overload of the Fraser River. And Willis, Cunliffe, Tait, being well known consulting engineers specializing to some extent in environmental matters, would be well aware, much more well aware, of that situation than the average person is.

When this situation was recognized and came to the attention of the authorities, there was a way to deal with it and that is probably what would have been allowed, had the proper permit been really applied for and considered and granted, as I expect it would have been. The solution was to put in a temporary pipeline at a cost of about 40 to $45,000.00 taking the overload directly into the Fraser River where it could be handled presumably without the same harm being done in an environmental sense and a visual sense also, as was the case in Baker Creek.

Baker Creek, as I have mentioned, is a fishery of sorts. It is even a creek where senior citizens and children are allowed to fish.

This is by no means the most extreme case of its kind. Mr. Cliffe, for the Crown, very fairly says that that is not the view that the Crown takes of this. But neither is not the view that the Crown takes of this. But neither is it a matter to be passed off as almost inconsequential in the way that Judge Krauko seems to have done in the *McCain Foods* case in New Brunswick by fining that very large corporate body only $1.00 per count on, I think, eight counts. On good conscience I do not think any judge in B.C. could deal with this case in that fashion and Mr. Hunter, for Willis, Cunliffe, has not suggested that I should.

Mr. Hunter has pointed out, and properly so, that his client indicated in advance of the trial date that a guilty plea would be entered. He has pointed out, and properly so, that this matter could not be considered an environmental disaster. But he has characterized it, as he is entitled to do in making his submission, as nothing much more than an (and his word was) oversight on the part of Willis, Cunliffe, Tait and Company.

I cannot regard it as a mere oversight. It continued from the 27th of August until steps were taken to curtail the situation following the observations of the police officer on the 8th of September. It was not an oversight; it was a very visible sight. Nobody could fail to see what was happening and nobody alert to the situation in his obligations could fail to understand that what was happening was wrong. Willis, Cunliffe, Tait are consulting engineers; they more than others should have been alert to that. And they had somebody there on site to supervise the work and to make sure, among other things, that things like this did not happen.

I am certain, as Mr. Hunter says, that Willis, Cunliffe, Tait take this matter seriously. They are embarrassed by it and that also is a factor to be taken into account. A company of consulting engineers of that stature will be more embarrassed by a court appearance in a matter of this nature and being condemned (and I think that is a proper word to use) in court than would some other individual or company with a different role in society.

There is no suggestion here that there was a deliberate plan to do something wrong. It was not that but it was more than an oversight. And in my opinion a proper fine to be assessed against Willis, Cunliffe, Tait and Company is $350.00 on each of the 16 counts.

That makes a total of $5,400.00. And taking into account Mr. Hunter's submissions wich were complete and helpful and Mr. Cliffe's which were similar, I think a total fine of $5,400.00 is sufficient to make it clear that these are serious matters.

The issue now, it seems to me, is to define a proper fine to be assessed against Spring Point and one that is both fair to that company and fair also to the general public whose interests are very much involved in cases of this nature. In some senses it might be said that there are factors which indicate that a fine against Spring Point should in total be somewhat less, as Mr. Sarnecki suggested, than the fine in total was assessed against Willis, Cunliffe, Tait and Company.

Willis, Cunliffe, Tait and Company are a company that operates on a larger scale across Canada. Spring Point I am told is a contracting company carrying on business out of Kelowna; it's work is primarily in sewer and water system contracting. The business is highly competitive these days and these are not good economic times for companies of that nature in British Columbia. Willis, Cunliffe, Tait has particular --- they're a firm of consulting engineers with some supposed and recognized expertise in matters of this nature, perhaps more than Spring Point, which is a contracting company but a contracting company having been involved in this kind of work for some time and Willis, Cunliffe, Tait designed the project, Spring Point were merely the people who were carrying out the work. On the other hand at the meeting that was held just before this work got underway it was discussed, it did not need to be discussed, but it was discussed and people should have left that meeting knowing perfectly well where their responsibilities lay as between the parties, as between the City of Quesnel; Willis, Cunliffe, Tait and Spring Point and it was clearly between those parties Spring Point's obligation to get the permits that this sort of work required. Now the people that were there at the meeting for Spring Point, perhaps understandably, since a lot was being discussed, but understandably from the point of view that all people make mistakes it's not an excuse but they seem not to have recognized it to have rather soon forgotten the fact that others were looking to them to get these permits. That's a rather significant failing it seems to me and in 1986 the fact that you can't go around dumping sewage into creeks and rivers in this country period, let alone creeks that flow into the Fraser River. That fact doesn't come as any surprise to anybody in this country in 1986. This is not some strange regulatory requirement dreamed up by local bureaucrats working around the clock in Ottawa. This is just straight common sense that before you can put such things into waters where there may be fish, into tributaries of the Fraser River. You've got to jump through certain hoops before you can change the process of putting these things into such waters. You've got to jump through certain hoops and that's what was going on here was drastically changing the existing set-up in the process of improving the overall system but it does not seem to me to be reasonable in the least degree for anybody to have thought that the type of work that was going to be carried out here and was carried out here could be done without getting permits from somebody, nobody would suspect that I think and particularly a contracting company that has done this sort of work before and aught to have been alert to its responsibilities and of course Mr. Sarnecki says that they recognized that there was a failing there, that's why they pleaded guilty. The problem is the extent of the failing.

It was Spring Point's people who actually did the work that resulted in excessive effluent being dumped into the Fraser River's tributary: Baker Creek, for a number of days. They did the work, they could see the results. Willis, Cunliffe's people failed in other ways but it was Spring Point's people who were there who did the work and anybody who was at all concerned could see what was very obviously an unsatisfactory situation and it went on for a number of days until it was finally ended by the complaint of a police officer. It shouldn't have taken that complaint to end this situation. It should have been obvious to Spring Point's people that they had created an intollerable situation.

It seem to me in some senses that perhaps all this could be said to be more the fault of Spring Point than it was the fault of Willis, Cunliffe but I really feel that all that is just cutting it a little too fine. This is not the sort of situation where I at least would feel confortable by saying it's sixty percent one parties responsibility and forty percent anothers and thereby assessing fines and when I look at the fact that the remedial work that was done by Spring Point, it was the expectation of Spring Point that in doing that remedial work which was extra to the contract, they would earn a profit of some fifty-seven hundred dollars according to the documents that Mr. Sarnecki has provided me with. When I take all of these factors into account I simply come to the conclusion that I cannot realistically say that there is a basis here to assess a different fine against Spring Point than was assessed against Willis, Cunliffe.

Mr. Cunliffe has not suggested that the fine should be larger. If he had I think my response would be much the same as I've just said but Mr. Sarnecki submits that the fine should be somewhat less and I simply am of the view that this is not a case where it is clearly right to differentiate between the responsibilities in this sort of a setting of Willis, Cunliffe and Spring Point.